(1)

91-1264

No._____

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner

v.

Merit System Protection Board,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VOLUME I OF V VOLUMES

Richard C. Soehngen
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QUESTION PRESENTED

Did the Department of Justice, as the employing agency, err as a matter of law or abuse its discretion where it terminated an employee in the Presidential Management Intern Program, which PMI employee was a preference eligible, special compensatory combat-disabled veteran, without extending to that PMI employee those due process rights and tenures specifically set for by Congressional legislation and the regulations implementing the PMI program?

RULE 14.1(b) LIST OF PARTIES TO THE PROCEEDING

The following is a list of the parties to the proceeding in the Court whose judgement is sought to be reviewed: The United States Court of Appeals for the Federal Circuit and the United States Department of Justice.

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Federal Constitutional Provisions:

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Federal Statutes:

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5 U.S.C. § 4303(e)
5 U.S.C. § 7511(a)(1)(B)
5 U.S.C. § 7512
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Federal Personnel Manual Regulations:

Chapter 362, Presidential Management Intern Program
Federal Personnel Manual Letter 362-3 "Significant Changes in the Presidential Management Intern Program as the Result of Executive Order 12364"

Agency Regulations:

DOJ Order 1771.1B, U.S. Department of Justice

Agency's Factfinder's Report and Recommendations:

Agency's Factfinder's Report issued by Mr. Roger Kaplan
Record of Proceedings, May 30, May 31, and June 16, 1990 Hearing (Three Bound Volumes of Sworn Testimony)

Federal Investigative Report:

Issued by the Federal Investigations and Processing Center, Boyers, PA at Petitioner's FOIA Request on September 29, 1989.

CASES:
(Reserved for Brief on the Merits)

Miller v United States (1983. CA3) 717 F2d 109, later proceeding (CA3) 753 F2d 270 (disagreed with Gavette v OPM (CA FC) 785 F2d 1568, transf to (CA FC) 788 F2d 753).

("Employee" for purposes of 5 USCS § 7511(a)(1)(B) includes preference eligible civilian employee of Armed Force who has completed one year of continuous service)

Flanagan v Young (1955) 97 App DC 119, 228 F2d 466.

(Veterans Preference Act (former 5 USCS § 7512) is to be construed, wherever possible, in favor of veterans; especially, this should be done where right to defend oneself from charge of wrongdoing is right involved.)

Ainsworth v United States (1967) 180 Ct CL 166.

(In determining eligibility for provisions of Veterans' Preference Act, determination that individual is in excepted service rather than in competitive service is distinction without significance.)

Miller v United States (1977, ED Pa) 438 F Supp 514.

(Veterans' Preference Act (former 5 USCS § 7512) applies to "preference eligible employees," being class of special employees ... who have completed trial period as executive agency employee (5 USCS §§ 2108(3), 7511), and statute permits removal of government employee only for such cause as will promote efficiency of service.)

Carter v Department of Army (1/23/84, MSPB) Docket No. DE07528210248.

(Employee serving under temporary appointment pending establishment of register, while not having competitive status, is in com-

petitive service; board consequently has jurisdiction over appeal of employee serving under temporary appointment where employee was removed after serving almost 3 years in position.)

Strawbridge v U.S. Postal Service (8/12/86 MSPB) Docket No. CH 07528510579, 31 MSPR 386.

(MSPB has appellate jurisdiction over employee's appeal of his removal where employee had more the "one year of continuous service ...")

Weston v U.S. Dept. of Housing & Urban Dev. (1983, CA FC) 724 F2d 943, 14 Fed Rules Evid Serv 1737.

(Removal is adverse agency personnel action under 5 USCS § 7512 and is accordingly reviewable under of 5 USCS § 7513.)

Sorrels v Veterans Administration (1783, SD Ohio) 576 F Supp 1254, 36 BNA FEP Cas 1323

(Removal is adverse action for which employee against whom such action is taken has right of appeal to the Merit System Protection Board.)

Stringer v United States (1950) 177 Ct CL 30, 90 F. Supp 375

(Veteran did not receive 30 full days of notice, where he was notified with less than 30 days notice.)

Connelly v Nitze (1968) 130 APP DC 351, 401 F2d 416

(Standard by which notice of proposed removal is to be measured requires that such notice adequately apprise employee of what he will be called upon to defend.)

Hayes v Department of Navy (1984, CA FC) 727 F2d 1535.

(5 USCS § 7503 requires that agency state in notice reasons for proposed action, and provide opportunity for oral and written replies as well as representation by counsel.)

Kolstad v Department of Agriculture (2/18/86 MSPB) Docket No. SE 07528510165, 30 MSPR 143

(Agency is required to provide information that is not only correct in nature but adequate in scope to allow employee to make informed decision including obligation to correct any erroneous information that agency has reason to know employee is relying on.)

U.S. v Charleston County School Dist., 738 F. Supp. 1513 USCA Const. Amends. 5, 14. D.S.C. 1990.

(Criteria which courts should review in order to determine whether a discriminatory purpose was a motivating factor in decision- making process are historical background of the decision, specific sequence of events leading up to challenged decision, departures fro normal procedural sequence, and legislative or administrative history.)

Southside Fair Housing Committee v City of New York, 750 F. Supp. 575, affirmed 928 F.2d 1336. E.D.N.Y. 1990

(Plaintiff may establish discriminatory intent behind action through circumstantial evidence, with relevant factors including degree of any discriminatory effect of action ... presence or absence of departures from normal procedures ...)

Gadsden v United States (1948) 111 Ct Cl 487, 78 F. Supp 126.

(If former civil service employee is removed not for cause that promoted efficiency of service, but maliciously, merely because his superior did not like him ... then employees's discharge is wrongful and illegal ...)

NO._____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RICHARD C. SOEHNGEN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard C. Soehngen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit finding that the Merit Systems Protection Board did not err as a matter of law or abuse its discretion where it determined that it did not have jurisdiction to review the termination of a special compensatory (30 percent or more), preference eligible combat-disabled veteran, which employee was in the Presidential Management Intern Program, from his employment in the Federal Government.

OPINION BELOW

The opinion of the Court of Appeals for the Federal Circuit is unreported and appears in Appendix A to this Petition. The unpublished written opinion of the Merit Systems Protection Board appears in Appendix D to this Petition.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on September 26, 1991. A timely petition for rehearing was filed on October 9, 1991, which is set forth at Appendix B. The Court of Appeals denial of the petition for rehearing was issued on October 31, 1991, and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254, and if applicable, Title 28, U.S.C. § 1651(a) at the Court's discretion.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Amendment V to the United States Constitution provides in relevant part: "... nor shall any person ... be deprived of life, liberty, or property without due process of law."

2. The congressionally-mandated provisions defining preference eligible veterans, 5 U.S.C. § 7511(a)(1)(B) is set forth in Appendix J and removal action covered, 5 U.S.C. § 7512 cited in this Petition.

3. The congressionally-mandated provisions providing for the manner in which preference eligible veterans may be removed from employment, 5 U.S.C. § 4303(e) and § 7513(a), (b),II A. 10., are set forth in Appendix K to this Petition.

4. The congressionally-mandated provisions defining "a special disabled veteran" as a veteran with a disability rating of 30 percent or more, and the policy of the United States to provide the maximum job advancement opportunities within the Federal Government for qualified disabled veterans, 38 U.S.C.S. § 2011 and 38 U.S.C.S. § 2014 respectively, are set forth in Appendix L to this Petition.

5. The Office of Personnel Management's regulation giving the basis for termination of PMI employees, which incorporates those statutory provisions extending certain protections to preference eligible combat-disabled veterans, cited above is found at Chapter 362, paragraph 2-8, of the OPM regulations and is set forth in Appendix M to this Petition.

STATEMENT OF THE CASE

Preface

I, Richard C. Soehngen, Petitioner, served honorably in the federal government as a Presidential Management Intern/program analyst with the Department of Army (August 1987 to January 1988) and the U.S. Department of Justice (January 1988 to August 1990) for a period of three (3) years total service. On August 14, 1990 Petitioner received

a ten (10) day termination notice from DOJ for the sole reason cited as "expiration of PMI appointment." This notice did not reflect Petitioner's known status as a special compensatory (30 percent or more), preference eligible combat- disabled veteran (hereafter referred to simply as a preference eligible veteran).

Subsequently, Petitioner appealed his termination, in-part, on his preference eligible veteran's right to MSPB jurisdiction and an evidentiary hearing, to the MSPB and the United States Court of Appeals for the Federal Circuit. Both lower courts have since decided Petitioner is a "temporary employee", who is not entitled to jurisdiction and the right to an evidentiary hearing in this case. Hence, this respectful Petition for Writ of Certiorari now before this Court.

In March 1987, while still in graduate school, Petitioner was notified by OPM that he had been selected as a 1987 Presidential Management Intern Finalist based on his special compensatory (30 percent or more), preference eligible combat-disabled veteran status.

In August 1987 Petitioner accepted an initial PMI/program analyst appointment as a preference eligible veteran, with a Department of Army agency in Falls Church, Virginia, where he served until January 1988. At that point, Petitioner successfully transferred to the United States Department of Justice, where he came to work in the Office of the Chief Immigration Judge.

In May 1989, Petitioner's participation in the PMI Program was extended into a third year. Ordinarily a two year-program, the PMIP allows for such an extension for additional training and development activities. Such extension must be predicated upon the formulation of an Individual Development Plan, and is granted only after the agency states why the employee could not have received this training during the previous two years of employment.

The primary reason given for Petitioner's PMI extension was that his background investigation was not completed. (This reason was later

shown to be without merit, by the Agency's own-appointed Fact-Finder. (Please see Appendix G for a more detailed explanation of the Fact-Finder's analysis following an evidentiary hearing.)

Petitioner was terminated at the end of the third year with only a ten (10) day notice. Approximately five weeks later, the Agency's own appointed Fact-Finder issued his report, based on three full days of sworn testimony in which twenty-five (25) exhibits and over 550 pages of sworn testimony, transcribed by a certified court reporter, comprise the record of proceedings. The Fact-Finder determined (1) that the United States Department of Justice had committed a prohibited personnel practice by violating Chapter 362 when it requested the extension of Petitioner's PMI internship for reasons that were without merit and (2) that Petitioner should have been converted to career status effective August 24, 1989 (the year before his unlawful termination). For a more detailed view of the circumstances governing this case, please refer to Appendix V, Summation of Employment History/Mitigating Sensitive Circumstances.)

During his three years with the agency, Petitioner never received an adverse action or notification either orally or in writing, that his work was deficient. He was not given an opportunity to contest his termination, as required by law and regulation.

The MSPB Administrative Law Judge, the Merit Service Protection Board, and the United States Court of Appeals for the Federal Circuit have each chosen to ignore Petitioner's preference eligible veteran's status and have denied Petitioner's requests for an evidentiary hearing in which Petitioner could establish that his termination was contrary to law and regulation.

STATEMENT OF THE FACTS

Petitioner respectfully requests the Court to take special note of the fact that there are no issues involving poor or unsatisfactory performance, misconduct, inefficiency, or unsuitability of record, (or of which Petitioner was informed), in this case (or in his three years of honorable federal service) which would otherwise warrant Petitioner's termination.

In March 1987 Petitioner received notification from the Director of the Presidential Management Intern Program (PMIP) that he had been selected by OPM as a 1987 Presidential Management Intern (PMI) Finalist. The letter is reprinted on the following pages for the Court's review.

The letter makes three points which the Petitioner respectfully asks the Court to consider:

1. The Director of the PMIP indicates Petitioner was reconsidered for the PMIP based solely on his special compensatory (30 percent or more) veteran's status, coupled directly with the expected completion of his graduate degree requirements.

2. Based on satisfactory performance, Petitioner could reasonably be assured that he would be converted to career status "without further competitive examination." (In contrast, the definition of a temporary employee, requires "further competitive examination" before conversion to career status.)

3. Petitioner could reasonably expect to look forward to a modest, but successful career in the federal government (based on satisfactory performance).

In addition, there is no reference (in this notification letter that Petitioner was a 1987 PMI Finalist) to suggest that Petitioner's anticipated appointment or tenure as a PMI would be as a "temporary employee" under his Schedule A. appointment or Tenure Group 2-designated tenure.

United States Office of Personnel Management
Washington, D.C.

March 30, 1987

Mr. Richard C. Soehngen
1437 Glenview Road
Palm Harbor, FL 33563

Dear Mr. Soehngen:

This is in response to your request for reconsideration of your application for the Presidential Management Intern Program (PMIP). First, let me apologize for the delay in getting back to you.

Upon further review of the PMIP review process, I have determined that you are due additional consideration based on your status as a compensable disabled veteran. Accordingly, I have added your name to the list of 1987 Presidential Management Intern Finalists. I appreciate your continued interest in a career with the Federal Government and believe there is no better way to begin such a career than as a Presidential Management Intern. I look forward to a meeting and working with you in the near future.

Should you for any reason no longer wish to be considered for a Presidential Management Internship, please NOTIFY US IMMEDIATELY so that alternates may be given the opportunity.

Many Federal departments and agencies are expecting to offer Presidential Management Internships to 1987 Finalists. Detailed information on the referral and placement process, participating agencies, and available positions will be sent to you under separate cover. These materials are designed to assist you in securing an internship position. However, it is important for you to understand that selection as a Finalist does not guarantee a PMI job. Most

Federal departments and agencies are having to deal with reduced employment ceilings. While we hope that all Finalists will eventually receive a job offer, over the next few months you may encounter some uncertainty about exact hiring plans.

One of the materials that will be sent to you is the PMI Handbook of Positions, which lists the agencies expected to participate in this year's Program. You will also be sent forms to be completed and returned to the address given on them. These forms are necessary to start your background investigation known as National Agency Check with Inquiries (NACI) and must be returned promptly. Participating Federal departments and agencies are beginning to review biographical profiles and complete application packages of all Finalists.

As a Federally employed Presidential Management Intern, you will be given a two-year appointment in the excepted service at the GS-9, step 1, level. The salary is approximately $22,500. Upon the successful completion of your internship you will be eligible for conversion to the career service without further competition. Before you begin work as an Intern, you will have to provide your hiring agency with an official document from your college or university verifying that you have completed all your graduate degree requirements, even if the actual degree is to be awarded at a later date.

It is very important to let us know of your phone number or address changes. In the coming months you may be receiving information about job updates. Also, a number of training and development activities for Presidential Management Interns will be scheduled. As plans become finalized, Program staff will be in touch with you.

Feel free to call or visit the Presidential Management Intern Program for information and general advice on the Program. The phone number is (202) 632-0496. Our address is: U.S. Office of Personnel Management, Presidential Management Intern Program/CEG, Room 308, 1121 Vermont Avenue, N.W., Washington, D.C. 20044.

I hope that your experience as a Presidential Management Intern will mark the beginning of a long and successful career in the Federal Service.

Sincerely,

Kenneth Bates
Director
Presidential Management Intern Program

With this preliminary notification letter offered as a guide, the Court is now respectfully asked to consider if the United States Court of Appeals to the Federal Circuit errs as a matter of fact, and as a matter of law, when it cites in its opinion the Petitioner was a "temporary employee". The Court should note that nowhere does it specify that the congressional and executive intent of the Presidential Management Intern Program was to create either explicitly or implicitly a class of PMI temporary employees; to the contrary Paragraph 1-1, Purpose, Chapter 362 specifically states that:

"The Presidential Management Intern Program **established by Executive Order 12008 on August 25, 1977 and reconstituted by Executive Order 12364 on May 27, 1982** is designed to attract to federal service outstanding men and women **from a variety of academic disciplines** who have a clear interest, and commitment to, a career in the analyses and management of public policies and programs." ... "The Presidential Management Intern Program provides for application of appropriate veteran's preference criteria and for equal employment opportunity."

In addition, the United States Court of Appeals for the Federal Circuit errs as a matter of fact, and as a matter of law, when it asserts in its opinion that:

"Petitioner (Soehngen) concludes that OPM's failure to continue his employment was an adverse action applicable to the MSPB."

To the contrary, Petitioner has consistently asserted before the MSPB and the United States Court of Appeals to the Federal Circuit that the direct responsibility for his continued employment (and unlawful termination) was his employing agency, the United States Department of Justice.

Section 2-7, paragraph b(2) of Chapter 362 of the FPM governing the Presidential Management Intern Program is quite specific as to which agency is directly responsible:

"The agency (based on unsatisfactory performance) decides whether or not to convert the employee. No recommendation is made to OPM."

Since 1978 when the PMIP was implemented, each PMI in each federal agency (with the exception of only those PMIs directly assigned in OPM's own personnel management system) has looked to his employing agency for "automatic career conversion" as required by the nature of his appointment and tenure group.

Therefore, Petitioner reasonably asserts to this Court that the lower court has committed fundamentally harmful and reversible error when it misleads Petitioner in its Decision and Order to believe his remedies and relief lie with OPM and not his employing agency, the United States Department of Justice.

While Petitioner looked directly to the United States Department of Justice as the agency responsible for his career conversion as a Presidential Management Intern/special disabled veteran, it is undisputed that OPM's function was, and is, to provide guidance to agencies regarding the Presidential Management Intern Program (PMIP).

In this case, OPM fulfilled its responsibilities to the United States Department of Justice and to the Petitioner by providing relevant and timely guidance to the Petitioner and to DOJ, with its Standard Form 50-B, Notification of Personnel Action, with the reverse side, "Notice to Employee" which is found in-part on the following pages.

The Court should note that the United States Department of Justice, with direct knowledge of Petitioner's special disabled veteran's status, employed this relevant OPM-provided document (and variations) to hire and promote, but then subsequently terminate Petitioner's employment without reference to his known preference eligible veteran's status.

NOTIFICATION OF PERSONNEL ACTION
STANDARD FORM 50-B
(REVERSE SIDE)

NOTICE TO EMPLOYEE

KEEP THIS DOCUMENT FOR YOUR RECORDS. IT IS YOUR COPY OF THE OFFICIAL RECORD OF A PERSONNEL ACTION AFFECTING YOUR EMPLOYMENT. PROMPTLY CALL ANY ERROR TO THE ATTENTION OF YOUR SUPERVISOR OR YOUR PERSONNEL OFFICE.

I. Conditions of All Types of Personnel actions

The personnel action identified on the face of this form is subject to all applicable laws, rules and regulations governing Federal employment.

II. Information About Appointments

As a general rule, persons selected from civil service registers to fill continuing jobs in the competive service are given career-conditional appointments. Such appointments are secured through direct competition with other members of the general public seeking similar work in Government agencies, and permit qualified employees to be assigned *without further competitive examination* to other jobs in the competitive service. *Career-conditional appointments become career appointments upon completion of 3 years of substantially continuous creditable service.*

The first year following a nontemporary competitive appointment generally is a probationary period during which an appointee must demonstrate full competance and fitness for Federal employment.

Temporary appointments do not confer a civil service status and do not lead to a career appointment or career-conditional appointment *without some further examination or qualification.*

III. **Information About Tenure Groups**

Those serving under conditional appointments which automatically lead to full tenure after a prescribed time and without further qualification are placed in Group 2.

[Petitioner respectfully asks the Court to note the difference in qualifications and anticipated tenure between employees who are placed in Tenure Group 2 cited above, and those qualifications and tenure prescribed for temporary appointments cited on the previous page, and represented below:]

Temporary appointments do not confer a civil service status and do not lead to a career appointment or career-conditional appointment without some further examination or qualification.

[Please note that the above references are an abridged portion of the OPM guidance furnished on Standard Forms 50-B, Notification of Personnel Action, to every government employee whenever he or she receives any positive or negative notification of personnel action. On the face side of this form, Petitioner has, consistently been referred to as a Schedule A, Tenure Group 2 designated employee who could reasonably expect his Schedule A appointment would "automatically lead to full tenure after a prescribed time and without further qualification," per his Tenure Group 2-designation].

Petitioner has also been consistently referred to in Block 5, Veterans Preference, as a Category 6, Special Compensatory (30 percent or more) disabled veteran. The one notable exception is the Standard Form 50-B, "Notification of Personnel Action", he received on August 14, 1990 terminating his employment effective August 24, 1990 without regard to his known preference eligible veterans status.

Block 18-B refers to the Petitioner's excepted appointment which, as a preference eligible veteran, is a "distinction without significance" for establishing MSPB jurisdiction.

In addition, OPM fulfilled its advisory role to the United States Department of Justice when it approved DOJ's request to extend Petitioner's PMI internship (not realizing the request was made without a legitimate basis to do so), that appears on the following page.

As Ms. Paige, OPM's Chief of the Programs Division, Office of Affirmative Recruiting and Employment, states in relevant part:

"Also the conditions for termination specified under FPM 362, Section 2-8, remain in effect during the one year extension."

The Court is also respectfully asked to note from the perspective of MSPB jurisdiction that DOJ cited two reasons to OPM for its request to extend Petitioner's PMI internship (please see Appendix X) which suggested Petitioner's background investigation was not completed and that his period of service as a program analyst was insufficient to warrant career conversion.

The Court should note further that both these reasons cited would be found to be without merit by the agency's own-appointed Fact- Finder a year later (please see Appendix G, Fact-Finders Report, and supporting document in Appendix Z).

The agency's own-appointed Fact-Finder would also find that the United States Department of Justice had violated Chapter 362 when it requested the extension of Petitioner's internship (and thereby had committed a prohibited personnel practice).

Further, the Fact-Finder found enough evidence and justification to warrant Petitioner's conversion to career status effective August 24, 1989 - a year before his unlawful termination as a "temporary employee"/"expiration of PMI appointment."

U.S. Office of Personnel Management

Washington, D.C. 20415

May 26, 1989

Mr. Warren Oser
Director of Personnel
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Oser:

This is to inform you that your request to extend the Presidential Managment Internship of Mr. Richard Soehngen for a third year, into 1990, is approved.

Mr. Soehngen may be non-competitively converted to the career or career-conditional service at <u>any</u> point during the third year. As noted in FPM Chapter 362, Section 2-4(c), he may not be promoted above the GS-11 grade level during the extended internship period. **Also, the conditions for termination specified under FPM Chapter 362, Section 2-8, remain in effect during the 1 year extension.**

If you have any questions or concerns, please contact Beth Elliott on 632-0601.

Sincerely,
>s
Patricia Paige, Chief
Programs Division
Office of Affirmative
Recruiting and Employment

The Court is respectfully asked to note with special interest that OPM's May 26, 1989 approval letter (cited in Appendix Y and on the previous page) to DOJ authorizing Petitioner's PMI internship extension for a third year, that the OPM approving authority (Ms. Paige) specifically and unmistakably cited Section 2-8 of FPM Chapter 362 as governing the conditions for termination.

Section 2-8 of Chapter 362 of the FPM speaks directly to the rights of preference eligible veterans in Petitioner's Presidential Management Intern Program:

> "The Schedule A appointment of a Presidential Management Intern expires at the end of the 2-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies' policies and procedures regarding budget constraints, staffing patterns and/or reduction in force. For preference eligibles as defined in 5 U.S.C. § 7511 (a)(1)(B), removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C.§ 4303(e) or those relating to adverse actions provided at 5 U.S.C. § 7513. **An agency may not remove an intern based upon a prohibited personnel practice listed in 5 U.S.C.**
>
> Termination actions should be consistent with the objectives of the program to select, develop **and retain** for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to Presidential Management Intern Program Office of the decision to terminate." (Emphasis Added)

Petitioner respectfully asserts to the Court that irrespective of the fact his appointment expired, his termination was a removal action as defined in 5 U.S.C. § 7512 below:

§ 7512. Actions covered
This subchapter [5 USCS §§ et seq.] applies to —

(1) a removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

Petitioner respectfully asserts further that (1) this August 14, 1990 removal action, effective August 24, 1990, was subject to OPM's May 26, 1989 approval (cited on page 14 and in Appendix Y) of DOJ's May 23, 1989 request for the extension of Petitioner's PMI internship (Appendix X) which required that Section 2-8 of Chapter 362 would apply to any termination, or removal action, during Petitioner's third year extension and (2) that this removal action was also subject under Section 2- 8 of Chapter 362 to the requirements for adverse removal action for those government employees classified as preference eligible veterans, defined below, which apply directly to Petitioner as a combat- disabled veteran.

Adverse Actions
§ 7511 Definitions; application

(a) For the purpose of this subchapter [5 USCS §§ et seq.]—
(1) "employee" means—
(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

Once again, Petitioner respectfully asserts that, as a preference eligible veteran, the fact he was in the excepted service instead of the competi-

tive service is "a distinction without significance" for purposes of establishing his right to MSPB jurisdiction and a hearing.

It is clear as a result of Ms. Paige's May 26, 1989 OPM approval of Petitioner's third year extension of his PMI internship, that the due process termination procedures governing preference eligible veterans outlined in Section 2-8 would control any removal action.

Therefore, Petitioner reasonably asserts to this Court that he was a known preference eligible veteran (to OPM, DA, and DOJ) as defined in 5 U.S.C. § 7511, and the 10-day termination notice he received for "expiration of PMI appointment" was a removal action as defined in 5 U.S.C. § 7512.

It is also clear that for preference eligible veterans in the Presidential Management Intern Program, removal actions are subject to the requirements for adverse actions based on two very legitimate and valid reasons - neither of which apply in Petitioner's case, and which were not used as a justification for his removal.

The first requirement is specified as an adverse removal action for unacceptable performance which is defined in 5 U.S.C. § 4303(e) and below.

§ 4303. Actions based on unacceptable performance

(e) any employee who is a preference eligible or is in the competitive service who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title [5 USCS § 7701].

The Court is also requested to note that if a preference eligible veteran is to be subject to an adverse removal action based on unsatisfactory performance, the following additional conditions must be met under 5 U.S.C. § 4303(e):

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice or the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of an agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

The Court is requested to note that the sole reason cited in Petitioner's August 14, 1990 removal action, effective August 24, 2990 was "expiration of PMI appointment". To-date Petitioner has never

received any notification of any unacceptable performance that DOJ management would have cited under 5 U.S.C. Section 4303 if it applied in Petitioner's case.

The second applicable section of the U.S. Code that was stated for an adverse action removal of a preference eligible veteran in the PMI Program is specified in Section 2-8 of Chapter 362 as provided for in 5 U.S.C. § 7513 cited below and which allows for removal for cause that will promote the efficiency of the service.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter [5 USCS §§ et seq.] against an employee only for such cause as will promote the efficiency of the service.

(b) an employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action:

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title [5 USCS § 7701].

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter [5 USCS §§ 7511 et seq.], together

with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request. (Added Oct. 13, 1978, P. L. 95-454, Title II, § 204(a), 92 Stat. 1136.)

Again, just as 5 U.S.C. § 4303 specifies, 5 U.S.C. § 7513 also specifies that preference eligible veterans will receive *inter alia:*

> "(1) at least 30 days written notice ... ; (2) a reasonable time, but not less than 7 days, to answer orally and in-writing and to furnish affidavits and other documentary evidence in support of the answers; (3) be represented by an attorney or other representative; (4) a written decision and the specific reasons therefor at the earliest practicable date."

It is undisputed that the United States Department of Justice chose to terminate Petitioner's employment as a preference eligible veteran in the Presidential Management Intern Program with only a 10 days written notice on August 14, 1990, effective August 24, 1990. As the Court may chose to interpret, a notice of removal action that is less than 30 days, is not a 30 days written notice.

It is also undisputed that, to-date, Petitioner has not received notice of the removal action to terminate his employment based on unacceptable performance provided at 5 U.S.C. § 4303(a); or those relating to adverse actions provided at 5 U.S.C. § 7513 as required by law and statute, and by Section 2-8 of Chapter 362 cited by OPM's approval of the extension of Petitioner's PMI internship.

To successfully show that Petitioner, as a preference eligible veteran, should have been removed under adverse action procedures for unsatisfactory performance specified in 5 U.S.C. § 4303 or those related to adverse actions to promote the efficiency of the service provided for in 5 U.S.C. § 7513, the government would have to show Petitioner's performance or conduct reflected on a Performance Work Plan (PWP) and/or Performance Rating, that was in some way deficient.

This the government can not do, despite ample opportunity to do so, and despite Petitioner's determination that a PWP would be established so his performance could be objectively evaluated.

The Court is respectfully requested to note that the purpose of a Performance Work Plan is (1) to determine employee performance and (2) to promote the efficiency of the service, as clearly established in 5 U.S.C. § 4302 cited below

5 U.S.C. § 4302. Performance-rating plans; establishment of:

> "For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal Service, each agency shall establish and use one or more performance-rating plans for evaluating the work performance of its employees."

As Appendix O, Appendix P, and Appendix S show clearly, despite the opportunity DOJ had to evaluate Petitioner's performance, and despite Petitioner's repeated attempts to initiate a PWP so he could be objectively rated, his immediate supervisor and reviewer, nevertheless, chose not to implement a PWP until ordered to do so on June 6, 1990 - two months before completion of Petitioner's third year.

Further, as the Director of the PMIP's March 1987 notification letter (that Petitioner was accepted as a 1987 Presidential Management Intern Finalist) also makes clear, Petitioner is also eligible for consideration as a special compensatory (30 percent or more), combat-disabled veteran.

The Court may chose to note that 38 U.S.C. § 2011. defines a special compensatory (disabled) veteran referred to in the Director of the PMIP's letter as:

38 U.S.C.S.

§ 2011. Definitions
As used in this chapter [38 USCS §§ et seq.]—

(1) The term "special disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Veterans' Administration for a disability rated at 30 percent or more, or (B) a person who was discharged or released from active duty because of a service-connected disability.

Despite a record of consistent attempts (since August 24, 1990, the day of his termination) to assert his special disabled veteran's rights to a full and impartial hearing, the United States Court of Appeals to the Federal Circuit totally ignored Petitioner's earned veteran's preference rights in its September 26, 1991 Decision and Opinion.

This Court may chose to note that this egregious breech of judicial review occurred even though Petitioner had provided a copy of the March 1987 PMI Finalist notification letter from the Director of the PMIP as an appendix in his Informal Brief of Petitioner submitted May 15, 1991 to the U.S. Court of Appeals to the Federal Circuit.

As the March 1987 letter from the Director of the Presidential Management Intern Program states with full authority, Petitioner was known by both OPM and DOJ to be a "special compensatory" veteran. Hence, the U.S. Department of Justice was required to give Petitioner, among other rights, a stated reason for his termination and a right to a hearing to contest his termination.

Additional congressional intent to protect special compensatory (30 percent or more) combat-disabled veterans from arbitrary dismissal are clearly defined in 38 U.S.C. § 2014(a) (Employment within the Federal Government):

"It is the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified disabled veterans of the Vietnam era."

Petitioner respectfully submits that a fair reading of the stated goals and objectives of the Presidential Management Intern Program that was provided earlier in this Petition for the Court's review, coupled

now with the above policy statement, reflects the unmistakable congressional intent to promote the "maximum job advancement opportunities" (cited in 38 U.S.C. § 2014) for special disabled veterans not only in the PMI nomination process, but also in retention/andtermination processes.

Again, to date, Petitioner has not received notice of the removal action to terminate his employment based on unacceptable performance provided at 5 U.S.C. § 4303(a) or those relating to adverse actions provided at 5 U.S.C. § 7513 as required by law and statute, and by the regulation cited by the OPM extension letter.

It is undisputed that Petitioner has a 50 percent permanent disability from the United States Army for "combat-related" injuries/wounds. It is also undisputed that the Veterans Administration has determined Petitioner is 70 percent disabled with no change in medical rating to-date as a result of his military experiences. If Petitioner's special disabled preference eligible veteran status was acknowledged by OPM, DA, and DOJ, - before hire in each case - then it should follow that both lower courts have committed fundamentally harmful reversible error by failing to acknowledge Petitioner's preference eligible status as well.

It is undisputed that the United States Department of Justice was fully appraised of the fact that Petitioner was a special compensatory preference eligible veteran before Petitioner was hired, but chose to ignore his special disabled veteran's status completely on his 10-day termination notice, presented without cause cited, after three (3) years of honorable federal service.

At no time was the Petitioner ever given notification of his adverse actions rights, despite the fact that the United States Department of Justice knew of his preference eligible combat- disabled veteran status; or given periodic review of his performance, except for one mid-cycle rating review (in which Petitioner's supervisor expressed satisfaction with his work) in three (3) years; nor was he ever counseled for poor or unsatisfactory performance, misconduct, inefficiency, or un-

suitability in over one thousand (1000) calendar days of federal employment.

Therefore, to paraphrase the central question before the Court somewhat differently, why - in this absence of poor or unsatisfactory performance, misconduct, inefficiency, or unsuitability - was a special disabled veteran, which veteran also was a Presidential Management Intern, not afforded due process protections to a hearing (day in Court) after being terminated after three (3) years of honorable federal service with only ten (10) days notice, and without cause cited?

To also appreciate Petitioner's "clear interest and commitment to a career" in the federal government, the Court is also respectfully requested to consider the following questions when reviewing the rulings of the lower courts which have consistently held Petitioner is a "temporary employee" without regard for his known preference eligible veteran status. These series of questions would have been presented during a hearing to establish jurisdiction if the MSPB had afforded the Petitioner the opportunity for a hearing.

(1) If Petitioner was to be considered a "temporary employee", why was he a member of the Federal Employees Retirement System(FERS) from the onset of his employment, August 24, 1987 through August 24, 1990, the day of his termination?

(2) If petitioner was to be considered a "temporary employee", why did the United States Department of Justice pay in excess of $20,000 to move his family of six from Texas to Virginia in August 1988?

(3) If Petitioner was to be considered a "temporary employee", why did the United States Department of Justice pay approximately $1,900 a month plus per diem expenses for an apartment for his family from August to November 1988.

(4) If Petitioner was to be considered a "temporary employee", why was he promoted as a PMI/program analyst from GS-9 to GS-11 within one year of his entering government service?

(5) If Petitioner was to be considered a "temporary employee", why did the United States Department of Justice grant Petitioner the right to the grievance process, with a costly transcribed record of proceedings by a certified court reporter that is estimated to have cost the Department in excess of $5,000? (The Fact-Finder's Report was not to consider Petitioner's termination, but was impaneled to hear Petitioner's grievance filed the year before regarding his PMI extension into the third year.)

(6) If Petitioner was to be considered a "temporary employee", why was he provided eight (8) months before his termination with nine (9) training courses (estimated to have cost the government several thousand dollars) to attend to within two (2) days of his completion of three (3) years of honorable federal service to the government? (Please see Appendix Q.)

(7) If Petitioner was to be considered a "temporary employee", why was he given a Performance Work Plan (PWP) on June 20, 1990 covering the period past his August 24, 1990 termination date (with only 10 days notice and without cause cited) through the March 31, 1991 rating cycle for DOJ employees? (Please see Appendix T.)

(8) If Petitioner was to be considered a "temporary employee", why did CIJ Robie offer in his June 10, 1988 letter to Petitioner career promotion potential to GS-13 as a program analyst (based on satisfactory performance) in the Criminal Alien Unit - obviously past Petitioner's August 24, 1989 PMI internship completion date - while Petitioner was stationed in Texas in 1988 in another capacity? (This letter is an exhibit taken under sworn testimony in an evidentiary hearing conducted by a Fact-Finder appointed by the United States Department of Justice.)

(9) If, as the lower courts contend, Petitioner was a "temporary employee", does not logic dictate Petitioner would have been subject to "further examination or qualification" before he could reasonalbly expect career conversion? But as the March 1987 PMI Finalist notification letter (and SF-50B, Notification of Personnel Action, Tenure Group 2 designation) makes clear, Petitioner could reasonably expect "Upon the successful completion of your internship (based on satisfactory performance), you will be eligible for conversion to the career service without further competition."

In fact since the inception of the PMIP in 1978, no Presidential Management Intern has ever been "subject to further examination or qualification", and per their "Tenure Group 2" classification, have had their Schedule A appointments "lead to full tenure after a prescribed time, and without further qualification."

In short, a PMI is normally converted to career status at the completion of his internship, which is indicative of the fact that it is expected an appointment may expire, but tenure will continue. Petitioner sought through the discovery process to show this evidence to the ALJ and the MSPB, but was denied his due process right to gather this evidence.

In summary, at its most narrow interpretation, the central issue before the Court is whether or not the lower courts erred, as a matter of fact and law, in classifying Petitioner's tenure as a third year Presidential Management Intern/special disabled veteran as that of a "temporary employee"; and thereby deny Petitioner had sufficient employment status after three (3) years of honorable federal service to warrant classification, at the very least, as a "preference eligible employee", which would otherwise invoke the appeal rights available under the Civil Service Reform Act.

For a further review of the arguments Petitioner offered to the MSPB regarding his request for MSPB jurisdiction and a hearing, please see Appendix E, Appellant's Submission on the Issue of Jurisdiction, and

Appendix F, Appellant's Supplemental Submission to the Record, with Appendix G, Agency Fact-Finder's Report attached.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This petition presents an issue where the Opinion below conflicts with previous decisions of this Court recognizing due process rights and property interests/employment status belonging to certain civil servants who are combat- disabled, preference eligible veterans; and, the Opinion below completely overlooks and ignores the arguments presented below that certain combat- disabled, preference eligible veterans are entitled to due process rights before they may be terminated, these rights being conferred not only by Congress but by the Executive Branch's Office of Personnel Management, which administers the PMI Program.

This Court has held consistently that no one may be deprived of a property interest by a government agency unless that property right be taken in accordance with due process of law. This Court has held that employment by a government agency may be considered a property right, where the employment involves tenure (the holding of employment for more than one year).

In this case now before the Court on Petition for Writ of Certiorari, the employing agency could not discharge from employment the Petitioner unless the agency acted in accordance with the Office of Personnel Management's regulations governing termination from the PMI Program. This regulation, set forth at Appendix M to this Petition, provides in substantial part:

"The Schedule A appointment of a Presidential Management Intern expires at the end of the 2-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies' policies and procedures regarding budget constraints, staffing patterns

and/or reduction in force. **For preference eligibles as defined in 5 U.S.C. § 7511 (a)(1)(B), removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C.§ 4303(e) or those relating to adverse actions provided at 5 U.S.C. § 7513. An agency may not remove an intern based upon a prohibited personnel practice listed in 5 U.S.C."**

"Termination actions should be consistent with the objectives of the program to select, develop **and retain** for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, **notification of adverse action rights for veterans** and notification to Presidential Management Intern Program Office of the decision to terminate."

As OPM's approval letter requires for the extension of Petitioner's internship into the third year, Petitioner reasonably had a protected right to either continued employment or to termination proceedings as set forth in the OPM letter and in Section 2-8, Chapter 362.

Unless this Court determines that the Congressional provisions — as incorporated by reference in the OPM's Presidential Management Intern regulations paragraph 2-8 — mandating the manner in which, and the grounds upon which, special compensatory, preference eligible veterans may be terminated from employment, provide for, in the least, an opportunity to be heard on the merits of whether a preference eligible employee's job termination was in accordance with the clear mandate of the law and the regulation, there will never be an opportunity for any preference eligible veteran within this classification of employees to seek review of his or her termination because the Merit Systems Protection Board does not accept jurisdiction. The reasoning of the Merit System Protection Board is circular: the MSPB will not even hold a hearing to determine whether it had jurisdiction, hence, it is impossible for a special compensatory preference eligible employee in the PMI Program to establish juris-

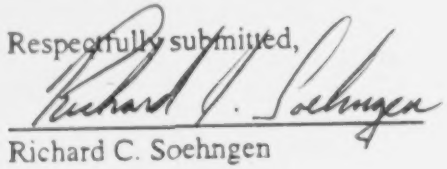
diction, much less to establish that the employing agency's termination actions were completely contrary to Congressional and agency mandate.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit in this matter.

December 26, 1991

Respectfully submitted,



Richard C. Soehngen

PRE-DOCKET COURT CORRESPONDENCE

The following pages contain all the correspondence relating to the filing of this Petition with the Office of the Clerk of the Supreme Court of the United States since December 26, 1991.

(Date stamped, "Received Hand Delivered", with the Court on December 26, 1991.)

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

RICHARD C. SOEHNGEN, Pro Se Petitioner

v.

UNITED STATES OF AMERICA, Respondent

MOTION TO PROCEED UNDER RULE 40 OF THE SUPREME COURT

Veterans, Seamen, and Military Cases

Petitioner, Richard C. Soehngen, a special compensatory (30 percent or more) combat-disabled veteran seeking to establish reemployment rights, respectfully asks the Court to invoke Rule 40 of the Supreme Court so he may file the attached petition for a writ of certiorari without payment of court costs or fees and permit Rule 39 regarding Pro Se printing requirements. In lieu of an affidavit in support of a motion for leave to proceed in forma pauperis, attached is an affidavit setting forth Petitioner's status as a special compensatory veteran.

_____

Pro Se Petitioner

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153
(703) 720-0315

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED UNDER RULE 40 OF THE SUPREME COURT

VETERANS, SEAMEN, AND MILITARY CASES

I, Richard C. Soehngen, being duly sworn, depose and say that I am the petitioner in the above-entitled case and that in support of my Motion to Proceed under Rule 40 of the Supreme Court, do hereby state the following:

During my first tour of duty in the Republic of Vietnam I was wounded-in-action on Friday, June 13, 1969. Some time later I received the award of the Purple Heart for wounds that had required medical evacuation (after the military objectives were finally achieved) and also decorated for my own modest actions stemming from the same three-day engagement.

Subsequently, I was also treated for other combat-related injuries during my second tour of duty in the RVN which has resulted in chronic non-psychiatric health problems that still persist today. In 1984, I was admitted as a patient at Walter Reed Army Medical Center for the first of two operations I would receive in the next year and a half. During this period in 1985, I was medically evaluated by a board of neurosurgeons and recommended for a 70 percent medical retirement as a Captain in the U.S. Army which later became a 50 percent permanent disability when my medical condition stabilized. Due to my medical, combat, and administrative records having been scrutinized by the board of neurosurgeons, an addendum to my retirement military orders specifies my medical retirement was a result of "combat-related" injuries. After I was retired from the U.S. Army in January 1986, the Veterans Administration also medically evaluated me in August 1986 and determined the same (70 percent) percentage of disability with no change in medical rating to-date.

My military retirement benefits are currently shared equally with my wife, Olga C. Soehngen; daughter, Diana Eve Soehngen; son, Victor

Andrew Soehngen; daughter, Julia Catherine Soehngen; and daughter, Natalie Erica Soehngen.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

_____

Richard Craig Soehngen

Submitted and sworn to before me this _____ day of _____, 1991.

My commission expires: _____

(Notarized)

_____

Notary Public

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, December 26, 1991, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached MOTION FOR LEAVE TO PROCEED UNDER RULE 40 OF THE SUPREME COURT and PETITON FOR A WRIT OF CERTIORI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

United States Court of Appeals for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, NW
Washington, D.C. 20439
(202) 633-6550

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this _____day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

(Date-stamped, "Received Hand Delivered", with the Court January 6, 1992)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. _____

RICHARD C. SOEHNGEN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

MOTION FOR RECONSIDERATION OF CLERK OF THE COURT'S IN FORMA PAUPERIS DEPARTMENT DECISION, DATED JANUARY 2, 1992, REQUIRING AFFIDAVIT OF INDIGENCY UNDER RULE 39 IN LIEU OF PETITIONER'S PREVIOUS MOTION AND AFFIDAVIT TO PROCEED AS A VETERAN UNDER RULE 40 OF THE SUPREME COURT

TO: THE HONORABLE WILLIAM H. REHNQUIST,
CHIEF JUSTICE OF THE SUPREME COURT

This motion is respectfully submitted under Rule 21 (Motions to the Court) and Rule 22 (Applications to Individual Justices) of the Supreme Court requesting the Court to interpret the affidavit requirements for veterans seeking to establish reemployment rights under Rule 40 of the Supreme Court. The essence of this case entails the rights afforded to special compensatory (30 percent or more) preference eligible combat-disabled veterans to equal access to justice under the law, and for this reason, the congressional and judicial intent of Rule 40 would be advanced if the Court were to find Petitioner is not obligated to pay court fees. Since this application requests a review of the intent and affidavit requirements of the Court's rules, this motion is respectfully submitted to the Chief Justice in lieu of to a Circuit Justice.

On December 26, 1991 Petitioner submitted a timely motion, with a notarized supporting affidavit, to proceed under Rule 40 of the Supreme Court with a writ of certiorari to the Court. On January 3, 1992 Petitioner received the attached letter dated January 2, 1992 from the Clerk of the Court's In Forma Pauperis Department requesting an affidavit of indigency under Rule 39. Also enclosed was the motion, notarized affidavit, notarized proof of service, writ of certiorari, and appendices filed December 26, 1991.

Please note the middle paragraph in the In Forma Pauperis Department's unsigned letter:

"No notarized affidavit or declaration of indigency is attached. See Rule 39. Youmay use the enclosed form."

Petitioner respectfully asserts these statements are incorrect for the following reasons:

* The notarized affidavit outlining Petitioner's veterans status required under Rule 40 (that was attached to his motion and returned by the In Forma Pauperis Department), is now resubmitted to the attention of the Chief Justice.

(Another motion, with attached notarized affidavit properly filed on December 26, 1991, remains on file with the writ of certiorari in the main section of the Clerk of the Court's office.)

* Rule 40 does not state Rule 39 applies.

* No enclosed form was included in the packet returned from the Court's In Forma Pauperis Department.

* In addition, I am unaware of any provision specified in the published Rules of the Court for the United States Court of Appeals for the Federal Circuit which would have afforded me the opportunity to proceed as a veteran at the lower court level, without payment of court costs and fees.

* Petitioner recognizes that he is not entitled to declare indigency before the Court despite the hardships associated with his extended unemployment. However, Petitioner reasonably asserts that his honorable motion to proceed as a veteran with a notarized affidavit setting forth his status as a veteran is a credible request to the Court to meet the intent and affidavit requirements of Rule 40.1 for the purpose of gaining equal access to justice under the law.

Accordingly, Petitioner requests the Court to interpret the intent, and affidavit requirements, of Rule 40.1 which states:

.1. A veteran suing to establish reemployment rights under 38 U.S.C. Section 2022, or under any other provision of law exempting a veteran from the payment of fees or court costs, may file a motion to proceed upon typewritten papers under Rule 34, except that the motion shall ask leave to proceed as a veteran, and the affidavit shall set forth the moving party's status as a veteran.

Petitioner reasonably asserts that his notarized affidavit in support of his motion to proceed as a veteran under Rule 40, which sets forth Petitioner's claim as a special compensatory, preference eligible combat-disabled veteran, meets the intent of Rule 40.1 without the necessity of filing a declaration of indigency. An attached errata change to this motion clarifies the intent of Petitioner's original motion to the Court requesting permission to proceed upon typewritten papers under Rule 34 (instead of Rule 39 inadvertently misstated in the original motion). Please note Petitioner is requesting to proceed as a veteran seeking to establish his reemployment rights under Rule 40 and not as an in forma pauperis seeking to overturn a criminal conviction under Rule 39. Both rules exempt the payment of fees and court costs, but Petitioner is requesting to proceed as a veteran, and not as an indignant, with an affidavit setting forth his status as a veteran as required by Rule 40.

Therefore, Petitioner respectfully requests the Court to interpret the intent, and affidavit requirements, of Rule 40.1, and advise the Clerk

of the Court's In Forma Pauperis Department and the Petitioner if Petitioner's Affidavit in Support of a Motion to Proceed Under Rule 40 meets the spirit and intent of Rule 40.1 of the Supreme Court.

In the event that the Court determines that Rule 40.1 does not exempt Petitioner from court costs and fees, and an affidavit of indigency or a payment of court costs is required, Petitioner requests that the Court so advise, and provide Petitioner with a reasonable time to pay the courts costs and fees.

The following documents are resubmitted and returned to the Court's possession for a designated docket number, while the Court awaits the United States Department of Justice's Brief in Opposition.

1. MOTION TO PROCEED UNDER RULE 40 OF THE SUPREME COURT 2. AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED UNDER RULE 40 OF THE SUPREME COURT 3. PROOF OF SERVICE 4. PETITION FOR WRIT OF CERTIORARI 5. APPENDICES

Per Rule 22.2, attached is the original and two copies of this application and Proof of Service indicating this motion, and attached errata change, was served by certified first class prepaid mail to all parties this date.

Dated January 6, 1992

_____

Richard C. Soehngen, Petitioner

Subscribed and sworn to before me this _____day of _____ My commission expires: _____

(Notarized)

_____

Notary Public

(Attachment to January 6, 1992 Motion for Reconsideration)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter,
Clerk of the Court

January 2, 1992

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153

RE: Richard C. Soehngen v. United States

Dear Mr. Soehngen:

The above-entitled petion for a writ of certiorari was hand- delivered December 26, 1991. The papers are returnedfor the following reasons:

No notarized affidavit or declaration of indigency is attached. See Rule 39. You may use the enclosed form.

Inasmuch as this case did not proceed in the lower court under 39 U.S.C. §2022, and affidavit of indigency is necessary. Resubmit only the original documents - no copies are necessary.

Very truly yours,
In Forma Pauperis Department
(202) 479-3025

Enclosures

(Attachment to January 6, 1992 Motion for Reconsideration)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ERRATA CHANGE

Petitioner hereby corrects the previously filed motion dated December26, 1991 entitled MOTION TO PROCEED UNDER RULE 40 OF THE SUPREMECOURT. Reference to my request to the Court to waive court costs orfees under Rule 40, should now be deleted, leaving only a request toproceed as a veteran upon typewritten papers under Rule 34.

_____

Richard C. Soehngen, Petitioner

(Atachment to January 6, 1992 Motion for Reconsideration)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, January 6, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached MOTION FOR RECONSIDERATION OF CLERK OF THE COURT'S IN FORMA PAUPERIS DEPARTMENT DECISION, DATED JANUARY 2, 1992, REQUIRING AFFIDAVIT OF INDIGENCY UNDER RULE 39 IN LIEU OF PETITIONER'S PREVIOUS MOTION AND AFFIDAVIT TO PROCEED AS A VETERAN UNDER RULE 40 OF THE SUPREME COURT on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

United States Court of Appeals for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, NW
Washington, D.C. 20439
(202) 633-6550

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this ___day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

January 13, 1992

Supreme Court of the United States
William K. Suter, Clerk of the Court
MG, USA JAGC (Ret.)
Office of the Clerk
Washington, D.C. 20543

Sir:

By way of a brief introduction, my name is Richard C. Soehngen. On December 26, 1991 I filed a timely motion with the Court requesting permission to proceed as a veteran under Rule 40 of the Supreme Court with a notarized affidavit setting forth my status as a special compensatory (30 percent or more) preference eligible combat- disabled veteran as required by Rule 40.1. The properly filed petition for writ of certiorari respectfully asks the Court to consider one (1) constitutional issue involving the due process protections that may be afforded to me as a preference eligible veteran to MSPB jurisdiction and a hearing. Also properly filed on December 26, 1991 was the proof of service as required.

On January 3, 1992 I received a letter from the In Pauperis Department (with my petition for writ of certiorari returned) requesting that I provide a declaration of indigency under Rule 39. Since I believe my December 26, 1991 affidavit in support of my motion to proceed as a veteran under Rule 40 has properly set forth my status as a veteran, I filed the attached motion (and application) for reconsideration with the Court on January 6, 1992 respectfully requesting the Court to interpret the affidavit requirements for veterans seeking to proceed under Rule 40 of the Supreme Court.

On January 11, 1992 I received another letter from the In Pauperis Department stating my papers were returned "for failure to reflect the changes requested in prior correspondence." However, the January 6, 1992 Motion for Reconsideration of the Clerk of the Court's In Forma Pauperis Decision dated January 2, 1992 Requiring Affidavit of

Indigency in lieu of Petitioner's Previous Motion to Proceed as a Veteran under Rule 40 of the Supreme Court had not been specifically denied by a Justice. Rule 22.5, Applications to Individual Justices, indicates that a Justice denying the application "will note the denial thereon".

In any case, I would like to respectfully emphasize that I wish to cooperate fully with your office with this follow-up request to proceed as a veteran and not as an in forma pauperis indigent. Please note that, although I am not an attorney, I have carefully reviewed Rule 39, and specifically Section 1746 (Unsworn declarations under penalty of perjury) and Section 1915 (Proceeding in forma pauperis) of 28 U.S.C.; and Section 3006A(d), (Attorney fees) of 18 U.S.C Therefore, I recognize, as I stated in my motion for reconsideration, that I am not entitled to declare indigency, or poverty, before the Court, despite the hardships associated with my extended unemployment.

However, I still believe my request to proceed as a veteran seeking to establish reemployment rights, with a notarized affidavit setting forth my status as a veteran, is a credible request to the Court in order to meet the intent and affidavit requirements of Rule 40.1.

To help cooperate fully with your office, I respectfully propose to withdraw my motion for reconsideration, pay the Court's filing fees, and submit an errata change to my original motion to proceed as a veteran under Rule 40 of the Supreme Court. Without waiving my original motion to proceed as a veteran, the attached example of my proposed errata change would strike my original request to the Court to waive court costs, and thereby ask the Court only to allow me to proceed as a veteran upon typewritten papers under Rule 34.

In closing, I hope this proposal meets with your approval and the Court's approval. While I simply cannot in good faith submit a declaration of indigency to the Court, I wish to cooperate as fully as possible with your office.

Please advise if this proposal is satisfactory so I may forward the proposed errata change to all parties concerned and pay the Court's filing fees. Enclosed are the documents returned to the Court's possession. Thank you for your consideration.

Respectfully,

Richard C. Soehngen, Petitioner
CPT, AUSR AR (Ret.)
Suite #100
8094 Rolling Road
Springfield, VA 22153

(Attachment to January 13, 1992 Correspondence)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter,
Clerk of the Court

January 2, 1992

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153

RE: Richard C. Soehngen v. United States

Dear Mr. Soehngen:

The above-entitled petition for a writ of certiorari was received January 6, 1992. The papers are returned for the following reasons:

You (sic) papers are returned for failure to reflect the changes requested in prior correspondence.

Very truly yours,
In Forma Pauperis Department
(202) 479-3025

Enclosures

(Attachment to January 13, 1992 letter to Clerk of the Court)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ERRATA CHANGE

Petitioner hereby corrects the previously filed motion dated December 26, 1991 entitled MOTION TO PROCEED UNDER RULE 40 OF THE SUPREME COURT. Reference to my request to the Court to waive court costs or fees under Rule 40, should now be deleted, leaving only a request to proceed as a veteran upon typewritten papers under Rule 34.

_____
Richard C. Soehngen, Petitioner

(Attachment to January 13, 1992 correspondence)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, January 6, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached ERRATA CHANGE, DATED JANUARY 13, 1992, on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

United States Court of Appeals for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, NW
Washington, D.C. 20439
(202) 633-6550

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this ___day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

(Date-stamped, "Received Hand Delivered", with the Court on January 22, 1992.)

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

RICHARD C. SOEHNGEN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

MOTION TO WITHDRAW REQUEST TO PROCEED UNDER RULE 40 AND REQUEST FOR EXTENSION OF TIME

Petitioner, Richard C. Soehngen, hereby withdraws his request to proceed under Rule 40 and requests an extension of time of ten days in which to have his petition and appendices printed in the proper format. Initially, petitioner requested leave to file his petition and appendices in typewritten format pursuant to Rule 40. The Court has treated this motion as a request to proceed in forma pauperis. Since the petitioner does not wish to proceed in forma pauperis and is prepared to pay the filing fee and comply with the court's requirements as to printing, petitioner now moves to withdraw his request to proceed under Rule 40 and to allow him an additional ten days to have his papers printed in the format required by the rules of the Court.

Richard C. Soehngen
Suite #100 8094 Rolling Road
Springfield, VA 22153
703-720-0315

Pro Se Petitioner

(Attachment to Motion to Withdraw Request to Proceed Under Rule 40)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, January 22, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached MOTION TO WITHDRAW REQUEST TO PROCEED UNDER RULE 40 AND REQUEST FOR EXTENSION OF TIME, DATED JANUARY 22, 1992, on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this ____day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

(Received by Petitioner on January 24, 1992.)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

William K. Suter
Clerk of the Court

January 17, 1992

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153

RE: Richard C. Soehngen v. Merit Systems Protection Board

Dear Mr. Soehngen:

In response to your letter of January 13, 1992, Rule 40.1 of the Rules of this Court expressly pertains to a "veteran suing to establish reemployment rights under 38 U.S.C. 2022, or under any other provision of law exempting a veteran from payment of fees or court costs." As your motion for leave to proceed as a veteran cites no statute which would bring you within the provisions of Rule 40.1, your petition may not be accepted for filing pursuant to that Rule.

If you do not qualify to proceed in forma pauperis, your petition may be filed only if you promptly submit forty copies of the petition prepared in compliance with Rule 33 and the $300 docketing fee required by Rule 38.

The papers that accompanied your letter are herewith returned.

Very truly yours,
WILLIAM K. SUTER
By
(s)Christopher W. Vasil
Deputy Clerk

January 31, 1992

Supreme Court of the United States
William K. Suter, Clerk of the Court
MG, USA JAGC (Ret.)
Office of the Clerk
Washington, D.C. 20543

Attention: Christopher W. Vasil, Deputy Clerk

Sir:

On January 24, 1992 I received your letter dated January 17, 1992, and understood that the delay in delivery was probably due to the Court's holiday schedule earlier in the week.

Thank you for the guidance and instructions for docketing my case that were contained in your letter. As you will note, I intend to file my case on February 3, 1992 with the 40 printed copies the Court now requires (and pay the Court fees) as soon as the printing is accomplished.

In closing, I appreciate your guidance in this matter and intend to comply as soon as possible. Thank you for your consideration.

Respectfully,

Richard C. Soehngen, Petitioner
Suite 100
8094 Rolling Road
Springfield, VA 22153

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, February 3, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 33, I have served three (3) copies of each five (5) volume edition of the PETITION FOR WRIT OF CERTIORARI WITH APPENDICES, on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this _____day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

(2)

No._____

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner,

v.

Merit System Protection Board,

Respondent.

APPENDICES

VOLUME II OF V VOLUMES

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153
(703) 720-0315

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APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

91-3256

RICHARD C. SOEHNGEN,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: September 26, 1991

Before ARCHER, MICHEL, and PLAGER, Circuit Judges.

PER CURIAM.

DECISION

Richard C. Soehngen received a two year Presidential Management Intern (PMI) appointment. His appointment was later extended one year. When the appointment expired, the Office of Personnel Management (OPM) did not further extend Soehngen's employment. Soehngen appealed to the Merit Systems Protection Board (MSPB or Board). The MSPB concluded that the decision to allow a term appointment to expire was not an appealable adverse action within the Board's jurisdiction. We affirm.

OPINION

Soehngen argues that he had a reasonable expectation of continued employment, beyond the termination date of his PMI appointment. Soehngen concludes that OPM's failure to continue his employment was an adverse action appealable to the MSPB.

It is true that the OPM directions and regulations cited by Soehngen are not crystal clear in expressing their intent or application. However, the interpretation urged by Soehngen would, regarding MSPB jurisdiction, treat an extension of a PMI appointment for a third year as though the extension itself created a permanent employment position. The record demonstrates that the MSPB has consistently rejected this argument. See also 5 U.S.C. § 7512 (1988); 5 C.F.R. § 752.401(b) (11) (1991).

The legal standard by which the Federal Circuit reviews decisions of the MSPB is that a decision must be affirmed unless it is found to be:

1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

2) obtained without procedures required by law, rule or regulation having been followed; or

3) unsupported by substantial evidence.

See 5 U.S.C. § 7703. In light of this standard of review and of the facts in this case, we have no doubt that the Board's decision must be and is hereby affirmed.

91-3256

United States Court of Appeals for the Federal Circuit

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: SEPT. 26 1991

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

SOEHNGEN V MSPB, 91-3256
(MSPB - DC07529010604)

APPENDIX B-1

UNITED STATES COURT OR APPEALS
FOR THE FEDERAL CIRCUIT

Richard C. Soehngen, Petitioner
v
Department of Justice, Respondent
Petitioner No. 91-3256

Informal Brief of Petitioner

1. Has the petitioner ever had another case in this court? NO In a United States District Court? NO In the Equal Employment Opportunity Commission? NO If so, identify each case.

2. Did the MSPB or the Arbitrator incorrectly decide or fail to take into account any facts? YES If so, what facts?

Facts regarding the reasonable expectation that there would be continued employment and that as a preference eligible veteran the board has jurisdiction.

The February 28, 1991, MSPB Opinion and Order at page 6, erred in fact and in law when it says the dispositive issue is, "whether the agency's action in releasing the appellant from employment upon the termination of his temporary PMI appointment is an action that is appealable to the Board." Consequently, the MSPB erred when it denied jurisdiction and when it denied a hearing on jurisdiction.

Petitioner's informal brief argues thusly:

I. THE ADMINISTRATIVE JUDGE AND THE MSPB FAILED TO CONSIDER THE FACTS AND LAW WHICH DEMONSTRATED PETITIONER'S

ENTITLEMENT TO PROCEDURAL DUE PROCESS. PP. 1-6

A. The FPM (Federal Personnel Manual) Provisions PP. 6-7
B. Conduct of Agency Officials PP. 8-12
C. Personnel Forms PP. 12-14

II. AS A PREFERENCE ELIGIBLE, PETITIONER STATUTORILY WAS ENTITLED TO ADVERSE ACTION PROCEDURES. PP. 14-17

III. PETITIONER IS ENTITLED TO A HEARING BECAUSE HIS APPEAL RAISED A NON-FRIVOLOUS ALLEGATION OF JURISDICTION PP. 17-19

IV. THE FACT-FINDER'S REPORT SHOULD BE ADMITTED INTO THE RECORD BECAUSE IT IS DISPOSITIVE ON THE ISSUES BEFORE THE BOARD. PP. 19-22

4. Did the MSPB or the Arbitrator fail to consider important grounds for relief? YES If so, what grounds?

Please refer to petitioner's informal brief attached hereto.

5. Are there other reasons why the MSPB's or the Arbitrator's decision was wrong? YES If so, what reasons?

Please refer to petitioner's informal brief attached hereto.

6. What action (relief) do you want the court to take in this case?

To find that the petitioner is entitled to a hearing on the merits as to petitioner's termination or, alternatively, to remand and

direct that the MSPB hold a fact-finding hearing to decide jurisdiction.

7. Do you want to argue before the court in person? YES
What are the reasons why argument will aid the court?

The case is factually complex and involves novel legal issues. Oral argument will assist the court in focusing upon the salient facts which, in turn, direct the law to be involved.

Date Petitioner's Signature

ARGUMENT

I. THE ADMINISTRATIVE JUDGE AND THE MSPB FAILED TO CONSIDER THE FACTS AND LAW WHICH DEMONSTRATED PETITIONER'S ENTITLEMENT TO PROCEDURAL DUE PROCESS

The central basis for MSPB's opinion and order, hereto attached at Appendix A, that the MSPB lacked jurisdiction to hear petitioner's appeal was the erroneous holding that the termination of Petitioner's PMI appointment was not an "otherwise appealable" action. However, this holding errs as to the unique nature of petitioner's appointment under the PMI program. The PMI program, as evidenced by regulation, memoranda, oral representations and behavior created a reasonable expectation of continued employment. The MSPB ignores the settled law that such an expectation created a Fifth Amendment property interest in employment, which in turn, entitled petitioner to procedural due process requirements such as notice and a hearing upon his termination from employment.

For the MSPB to hold, as a mater of law, that it had no jurisdiction to entertain petitioner's claims erred in that the administrative judge's declination of jurisdiction was not supported by substantial evidence on the record. The erroneous holding on the conclusionary, or ultimate, fact resulted in misapplication of the law.

An individual alleging that he or she has been deprived of his constitutional rights to notice and a hearing must first demonstrate that he had a legitimate entitlement to his job sufficient to constitute a protected property interest under the Fifth or Fourteenth Amendment. See Paige v. Harris, 584 F.2d 178, 181 (7th Cir. 1978). When the decision to discharge a public employee results in a deprivation of property interest, such as termination of employment, due process requires a notice of the charges and a type of hearing. Id. at 181 See also Arnett v. Kennedy, 416 U.S 134 (1974). In the federal employment sphere, these due process

concerns have been codified in the adverse action procedures found in 5 U.S.C. § 7511 et seq.

It has long been established that an employee's reliance upon assurances from an employer that his employment will continue may give rise to an expectation of continued employment, which invokes due process protections. For example in Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court considered whether a college professor who relied on policies and procedures articulated by the college could establish that he had an expectation of continued employment even though he had no formal tenure agreement with the college. The Court held that a property interest in employment may be established by the existence of rules and understandings which may justify as legitimate a claim of entitlement to continued employment, and accordingly, invoke due process protections. Id. at 602.

Similarly, in Aston v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979), the court determined that a letter given to an employee when he was initially hired at the FBI, and various provisions of the FBI Handbook, created an expectation of continued employment that gave rise to due process rights. Thus, the court held that even through the employee's job position was "expected by law from the competitive Civil Service the employee had a property right in employment which entitled him to notice and a hearing upon termination. Id. at 930. The court specifically note that since the dimensions of a property interest are defined by the rules and understandings which give rise to it, and since the agency's promise was by its terms contingent only on "satisfactory work," the employee could properly be dismissed only for failing to perform his duties satisfactorily and without prejudice to the achievement of the agency's mission. Id.

In Page v. Harris, 584 F.2d 178 (7th Cir. 1978), the court found that the handbook published by the Department of Housing and Urban Development provided rules and understandings sufficient to create a legitimate claim of entitlement to continued employment and a due process property interest sufficient to enable the employee to a hearing on which he could challenge the basis for his non-retention. See also Tamura v. FAA, 675 F. Supp. 1221,

1226 (D. Hawaii 1987) (court found that agency created a "situation instinct with obligation," in its relationship with employee sufficient to create a property interest protected by due process clause).

Moreover, the MSPB has recognized that the due process principles set forth by the Supreme Court in Perry and its progeny extend to preference eligible in MSPB appeals who establish a reasonable expectation of continued employment. For example in Shelton v. Federal Deposit Insurance Corp., 38 M.S.P.R. 303 (1988), the MSPB found that a preference eligible is entitled to notice and a hearing to challenge an adverse action where the record establishes that the individual had a reasonable expectation of continued employment. In that case, the administrative judge found that the appellant met the statutory definition of "employee" under 5 U.S.C. § 7511 (a)(1)(B) because he established that he was a preference eligible employee who had completed one year of current continual service in the same or similar position. The administrative judge further found that the appellant was the subject of an adverse action, i.e., removal, which was appealable to the Board. Id. at 305. In reaching this holding, the administrative judge relied upon Roden v. Tennessee Valley Authority, 25 M.S.P.R. 363 (1984) and Stevens v. Tennessee Valley Authority, 687 F.2d 158 (6th Cir. 1982), for the proposition that the MSPB must look at the true nature of an employee's appointment, 38 M.S.P.R. at 306.

The Board has clearly indicated that in situations where an employee is able to demonstrate a reasonable expectation of continued employment, a property interest may be created and procedural due process rights may attach.[1]

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[1] Far from supporting dismissal of petitioner's appeal in this case as the Administrative Judge Bogle apparently found in this case, Shelton stands for the proposition that a reasonable expectation of employment, particularly construed in the context of veteran's preference legislation, may enable an employee to obtain appeal rights to the board. Judge Bogle also cites Meade v. Federal Deposit Insurance Corp., 41 M.S.P.R. 191 (1989), in support of the proposition that petitioner was not entitled

Furthermore, the fact that a position may be termed "temporary" does not mean that an employee may never demonstrate a reasonable expectation of continued employment. For example, in Stevens v. Tennessee Valley Authority, 687 F.2d 158 (6th Cir. 1982), the court conducted an analysis of the meaning of the term "temporary position" in the context of the Vietnam Era Veterans Readjustment Act, 38 U.S. C. § 2021. The court noted that while an employer is free to create both temporary and non-temporary positions, it cannot do so simply by designating a particular position as temporary, if in fact, the characteristics of that position make it non-temporary. Thus, the court found that in determining whether a particular position is temporary, the trier of fact must examine all of the relevant characteristics of the position, not simply the designation given to it by the employer. 687 F.2d at 161. Significantly, the court also stressed that the proper test to determine whether a position is temporary is whether there was a reasonable expectation, in light of all the circumstances of employment, that the employment would not continue for a significant or indefinite period. Id. at 161.

In light of these clear legal principles, petitioner's reasonable expectation of continued employment is clearly established by a myriad of factors, which were presented to and completely ignored by the administrative judge, including the applicable provisions regarding PMI appointments in the Federal Personnel Manual ("FPM"), the conduct of the agency officials regarding the issues of the performance work plan and the training provided to petitioner, ad the unique nature of petitioner's appointment as established by the personnel action forms utilized to effect his appointment.

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to due process protections. However, Meade is not dispositive in this action because in the case, the board strictly followed the decision on the merits of Shelton, which did not involve the principles articulated in Roden and Stevens concerning the reasonable expectation of employment.

A. The Federal Personnel Manual Provisions

Contrary to the administrative judge's interpretation of the FPM provisions at issue in this case, the language of these provisions suggests a reasonable expectation of continued employment contingent upon satisfactory job performance, similar to that relied upon by the court in Ashton v. Civiletti.[2] Specifically, Chapter 362 of the FPM provides that an employee in the PMI program has an expectation of conversion as long as the employee has performed at the agency in a satisfactory manner. See FPM Chapter 362, Sections 2-7 and 2-8, attached hereto as Appendix B. Thus, as in Ashton, a PMI such as petitioner in this case, who received "Fully Successful" performance appraisals throughout his PMI could reasonable expect to be converted to career status.[3] Indeed, Section 2-7, FPM, chapter 362 requires that PMI employees either be converted or terminated. There is no provision for PMI employee to lose employment by expiration of term of employment, by lapse or passage of time, or any other such way other than by termination.

It is undisputed that throughout his tenure as a PMI, petitioner received "Fully Successful" performance appraisals. Thus, under the applicable FPM provisions, petitioner had every reason to believe that he would be converted to career status, and thus, that his employment would continue beyond the term of his PMI appointment.[4]

The Federal Personnel Manual, at Section 2-8 suggests that there is no such provision for an employee in the PMI program to expire, or have his status lapse by expiration of term. Indeed, the FPM defines "expire and termination" interchangeably, and it

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[2] SEE ASTON, 613 F.2d at 929-30.

[3] The Agency has not raised any issue concerning petitioner's performance, misconduct, unsuitability, or inefficiency as reasons justifying his termination from employment.

[4] Petitioner's request for discovery as to the number of PMI's who did convert was denied.

provides certain actions for terminations or expirations. All of this clearly indicates that the MSPB erred when it essentially finds PMI appointments to be temporary.[5]

B. Conduct of Agency Officials

In a letter to Petitioner dated June 10, 1988, in which Judge Robie offered Petitioner the position of program analyst in the CAU of the Office of Chief Immigration Judge, Judge Robie premised petitioner's job offer on the notion that it would lead to a career appointment and advancement within the agency. Specifically, Judge Robie stated that:

> You can expect to be promoted to GS-11/1 when you become eligible (PMI entry dated on duty date, August 23, 1987). Longer term career development potential to the GS-12 (at internship

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[5] Federal Personnel Manual, Chapter 362, § 2-8; "The Schedule A appointment of a Presidential Management Intern expires at the end of the two-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see Section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies; policies and procedures regarding budget constraints, staffing patterns and/or reduction in force. For preference eligible as defined in 5 U.S. C. 7511 (a)(1)(B), removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C. § 7513. An agency may not remove an intern based on a prohibited personnel practice listed in 5 U.S.C. § 2302. Termination actions should be consistent with the objectives of the program to select, develop and retain for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to the Presidential Management Intern Program Office of the decision to terminate." (Emphasis Added).

conclusion) and GS-13 levels based on job performance are associated with this position at ACU.

This letter establishes the legitimate expectation that petitioner would have continued employment in the Federal Government as long as his performance was successful, especially given the fact that throughout the petitioner's service in the PMI program, his performance was rated at least fully successful by agency officials. See Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979).

Judge Robie's letter comported with the letter issued by Director, Presidential Management Intern Program, Office of Personnel Management, on 30 March 1987. In that letter, a copy which is attached hereto as Appendix C, it is provided that the petitioner will be eligible for conversion, without further competition, to the career service upon successful performance of petitioner's internship. A fair reading of this letter, coupled with FPM, Chapter 362, supports that eligibility turns upon satisfactory work, and agency staffing/budgetary provisions. If no further competition is required to convert, then it seems arguably obvious that such tenure as is inherent in the PMI program is not that tenure which expires by the very term, letter and authority of appointment. The agency's and the Merit System Protection Board's finding of petitioner's appointment as having a definite date of expiration cannot be reconciled with the terms of this letter.

Other actions on the part of agency officials justify petitioner's reasonable expectation of continued employment. For example, the agency approved a performance work plan for him on June 20, 1990. This plan covered the period of June 20, 1990 through March 31, 1991 — 7 months past the date when the third and final year of petitioner's PMI appointment was to expire.

In February, 1990, the agency finally approved nine training courses for the petitioner to attend. These courses were not integrated into a PMI Individual Development Plan. Between February and August of 1990, petitioner completed seven of the nine courses and the two remaining courses were canceled by

OPM. in fact, petitioner completed his last training course on August 22, 1990 — after August 14, 1990, the date on which he was advised that he would not be converted to career status and just before Petitioner was terminated (August 245, 1990) with only ten days notice.

In May of 1989, the request for PMI extension was forwarded to OPM some eight months before the Petitioner finally received the training plan. Chapter 362-6 of the Federal Personnel Manual (FPM) requires that an Individual Development Plan for the intern during the third year, containing specific assignments and learning objectives, must accompany the extension request.

FPM, Chapter 362-6 states that the Agency must provide certain information when requesting an extension. It is undisputed that the Agency did not submit the required information when the PMI extension request was submitted.

Assuming arguendo, that the Petitioner's Performance Work Plan, based on his job description, ad receive on June 20, 1990[6] and the extensive list of training courses were all designed to evaluate the Petitioner's work performance and to prepare the Petitioner, during the third year extension period, for conversion, then it follows that for the Petitioner not to be rated against the performance work plan an the completion of the training, conclusively demonstrates that DOJ was not interested in providing another job performance rating of, at least, fully satisfactory. To do so would have placed DOJ in the position of justifying a non-

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[6] The Petitioner's Performance Work Plan was received only after he formally filed a grievance to force management to rate his work performance during the next rating cycle, part of which fell within the third year extension period. It is customary and normal for employee's to receive a performance rating based upon performance work plans. A performance rating was never received during the above referenced rating cycle nor during entire third year extension.

conversion when the Petitioner had successfully completed the internship by any measurable standard.[7]

In addition, it is clear that an adverse action did occur when the agency chose to ignore its responsibilities under the PMI program and chose to let the internship expire by extending it a their year followed by no periodic performance review, no counseling, and no notice of adverse action as required in Section 2-8 of Chapter 362 of the FPM.[8] Indeed, as set forth supra, at footnote 5 and accompanying test, there in no distinction drawn in the FPM between "expire" and "terminate". The agency's actions in this regard were arbitrary, capricious, abusive of authority, and without basis in law.

Based on these facts, it is unreasonable to conclude that petitioner should have considered himself to be in a temporary position as the administrative judge suggested in her initial decision, especially given the fact that he provided services to the agency under a performance work plan and training schedule which remained in effect past the time when he was advised about his termination. The Petitioner also received a job performance rating in May of 1989 covering an eight month period (August, 12988 through March 31, 1989). This rating stated that the Petitioner was

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[7] Federal Personnel Manual Letter 362-3, January 18, 1983, paragraph 10, Provider, inter alia, that PMI employees held over for a third year "assuming satisfactory performance, . . . will be converted to career appointments." By logic, formal assessment of a PMI's performance must be made before a decision to convert to career status can be made. Such OPM mandated personnel procedures cannot be reconciled with the agency's and the MSPB's conclusion that no appraisal be made, that a PMI may be "terminated" solely by passage of time. Appendix D attached hereto contains a copy of FPM Letter 362-3.

[8] "Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to the Presidential Management Intern Program office of the decision to terminate."

performing in a fully satisfactory manner thus successfully meeting the requirements for conversion.

C. Personnel Forms

The permanent nature of petitioner's appointment is also established by the paperwork documenting petitioner's admission into the PMI program. The Notification of Personnel Action Form indicating petitioner's hire into his initial PMI appointment with the Department of the Army states that:

> APPOINTMENT IN NTE TWO YEARS, UPON SATISFACTORY COMPLETION OF INTERNSHIP, YOU MAY BE NON-COMPETITIVELY CONVERTED TO CAREER OR CAREER-CONDITIONAL APPOINTMENT. IF YOUR PERFORMANCE IS NOT SATISFACTORY OR IF YOUR FAIL TO SATISFACTORILY COMPLETE INTERNSHIP, EMPLOYMENT WILL BE TERMINATED. (Emphasis Added)

The notification form clearly created an expectation that, if petitioner satisfactorily completed the internship, he would be non-competitively converted to a career or career-conditional appointment.

Moreover, both the Request for Personnel Action Form admitting petitioner to the PMI program and the Request for Personnel Action reflecting his initial employment with DOJ created a reasonable expectation of continued employment. On both forms, the code under Block 18-A, NOAC, is 170. Pursuant to the Department of Justice Personnel Guide to Processing Personnel Actions, FPM Supplement 296-33, Chapter 11, appointment as a Schedule A employee with a code of 170 is characterized as an excepted service without time limitation, as contrasted with the code of 171, which is characterized as a temporary appointment with a "not to exceed date" limiting the

appointment. Significantly, on both of petitioner's requests, there is no reference to any "not to exceed date" limiting the appointment. Significantly, on both of petitioner's requests, there is no reference to any "not to exceed date" in Block 18-8, reflecting the nature of appointment.

Thus, by its very nature, a PMI appointment is not temporary. For the agency and the MSPB to so argue, ignores this distinction set forth in the agency's own well-established personnel process and violates its own very specific rules to follow.

Finally, on both the Request for Personnel Action form reflecting petitioner's appointment to the PMI program an August 1987 and the Notification of Personnel Action form indicating petitioner's hire into the Executive Office for Immigration Review, petitioner's tenure status is noted as Group 2. Group 2 is defined to include employees who serve under conditional appointments which automatically lead to full tenure after a prescribed time and "without further qualification."

Under FPM Supplement 296-33, excepted service employee appointments in tenure Group 2 are defined as "employees who are serving a trial period and employees whose tenure is equivalent to career-conditional tenure and the competitive service in agencies that use that type of appointment system." Thus, petitioner's designation as a "Group 2" employee meant that he was in a category of employees whose conditional appointment automatically led to permanent career conversion.

As demonstrated above, the facts in this case clearly establish that the petitioner had, at the very least, a reasonable expectation that he would be converted to a career position at the end of the third year of his PMI appointment. This reasonably founded belief, which is amply demonstrated by the evidence developed in the proceedings before the administrative judge and the MSPB, created a property interest in employment. Accordingly, under the Supreme Court's decision in Perry, and the other cases discussed herein, petitioner was entitled to the procedural due process protections of notice and a hearing when the agency decided to terminate his employment. The

administrative judge's and the MSPB's findings to the contrary are erroneous and should be reversed.

II. AS A PREFERENCE ELIGIBLE, PETITIONER WAS ENTITLED TO ADVERSE ACTION PROCEDURES

Even if the Board could find that petitioner, in his status as a PMI employee, did not have a reasonable expectation of continued employment which entitled him to procedural due process, he still was entitled him to procedural due process, he still was entitled to notice and a hearing in the facts of this case. As a special compensatory disabled preference eligible veteran, petitioner would normally be entitled to notice and a gearing for any removal action initiated against him. See 5 U.S.C. §§ 5711 and 7513.

Preliminary, petitioner was accorded preference eligible, combat disabled veteran's rights when petitioner competed for and was accepted, into the PMI program. See March 30, 1987 OPM Letter cited previously, and found at Appendix C. It is a paradox for the agency and the Merit System Protection Board to now argue that those preference eligible veteran's rights do not now attach to Petitioner.

Section 2-8 of Chapter 362 FPM, which contains regulations pertaining to PMI appointments provides:

> "The Schedule A appointment of a Presidential Management Intern expires at the end of the two-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see Section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies' policies and procedures regarding budget constraints, staffing patterns and/or reduction in force. For preference eligible as defined in 5 U.S.C. § 7511 (a)(1)(B),

> removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C. § 4303 (e) or those relating to adverse actions provided at 5 U.S.C. § 7513. An agency may not remove an intern based upon a prohibited personnel practice listed in 5 U.S.C.
>
> Termination actions should be consistent with the objectives of the program to select, develop and retain for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedure should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to the Presidential Management Intern Program Office of the decision to terminate." (Emphasis Added)

In this case, as demonstrated above, petitioner's performance as a PMI was fully satisfactory. Thus, under the clear language of the FPM, petitioner was entitled to adverse action procedures, including notice and a hearing, in connection with the termination of his employment.

The administrative judge and the MSPB dismissed petitioner's clear entitlement to notice and a hearing on the merits of the action taken against him by the agency in this case by holding that the intent of these particular provisions was only to grant appeal rights to preference eligible who were terminated from PMI appointments because or poor performance or misconduct prior to their natural expiration. However, this rather restrictive reading of the FPM provisions makes no sense in light of the clear language to the contrary. There would be no need whatsoever for adverse action rights and procedures is all an employing agency need do to rid itself of an employee would be to not rate or review the employee — essentially a job termination for want of a performance appraisal.

Pursuant to Section 2-8 of FPM Chapter 362, the Schedule A appointment of a PMI expires at the end of the two year internship period. If the agency neither converts nor extends the internship, the PMI appointment "terminates". This termination of appointment is, petitioner submits, equivalent to a removal action, which entitles individuals such as petitioner who are preference eligible to notice and a hearing under 5 U.S.C. § 7513.[9]

Accordingly, the administrative judge erred in finding that adverse action procedures were not required in this case by virtue of petitioner's status as a preference eligible.

Moreover, the agency's failure to follow the requirements of § 7513 in this case requires reversal of petitioner's termination. See Blalock v. Department of Agriculture, 28 M.S.P.R. 17 (1985) aff'd, 793 F.2d 284 (Fed. Cir. 1986), cert. denied, 479 U.S. 1043 (1987). In Blalock, the Board held that preference eligible employees have a right to an appeal from removal and that the absence of the procedures required by 5 U.S.C. § 7701 (c)(2)(A).

As argued above, petitioner, a special compensatory disabled preference eligible veteran, was entitled to be provided with the procedures required by 5 U.S.C. § 7513. The agency's failure to extend the benefit of such procedures to him constitutes harmful, reversible error.

III. PETITIONER IS ENTITLED TO A HEARING BECAUSE HIS APPEAL RAISED A NON-FRIVOLOUS ALLEGATION OF JURISDICTION

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[9] 5 U.S.C. § 7513: provides inter alia, "(1) at least 30 days written notice . . .; (2) A reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answers; (3) be represented by an attorney or other representative; and (4) a written decision ant the specific reasons therefore at the earliest practicable date."

Even if the factual record is not sufficiently developed to determine whether the Board has jurisdiction to hear petitioner's case, the administrative judge and the MSPB erred in dismissing the appeal because petitioner raised a non-frivolous allegation of jurisdiction, which entitled him to a hearing on that issue. Burgess v. MSPB, 758 F.2d 641, 643 (Fed. Cir. 1985).[10] Bagge v. Department of the Navy, 38 M.S.P.R. 326 (1988). See Spiegle v. Department of the Army, 2 M.S.P.B. 307 (1980). Petitioner as consistently argued that he was entitled to a hearing because he had a reasonable expectation of continued employment, which gives rise to a Fifth Amendment property interest and attendant procedural due process rights. As demonstrated above, the legal issues on this point are well established an have been recognized by the Board itself. E.g., Shelton v. Federal Deposit Insurance Corp., 38 M.S.P.R. at 307.

In addition, one of the issues that petitioner raised in his appeal was the fact that the intent of the PMI program and OPM is to convert all satisfactory performing PMI appointments to career positions. Petitioner sought to obtain additional evidence of this crucial point by propounding discovery requests to OPM.

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[10] In Burgess, the Federal Circuit held that an administrative judge failed to give an appellant adequate notice of what was required to establish Board jurisdiction prior to dismissing a appeal on jurisdictional grounds. Specifically, the court found that the show cause order issued by the administrative judge failed to adequately appraise the appellant that she would be required to come forward with evidence of a non-frivolous allegation that her resignation from employment was not voluntary in order to withstand jurisdictional challenge. 758 F.2d at 642-43. See also Mahiney v. Department of the Navy, 32 M.S.P.R. 432 (1987); Johnson v. Department of the Navy, 35 M.S.P.R. 236 (1987); Bibby v. Department of Transportation, 30 M.S.P.R. 507 (1986). In this case, the administrative judge's order requesting submissions on jurisdiction also failed to appraise appellant of what would be required to raise a non-frivolous allegation of jurisdiction sufficient to entitle him to a hearing on that issue. Accordingly, the administrative judge committed harmful procedural error, requiring reversal and remand to allow petitioner to present evidence and obtain a jurisdictional hearing.

However, DOJ filed a motion to deny these requests, and the administrative judge ultimately dismissed the cases on jurisdictional grounds without ruling on petitioner's Motion to Compel such discovery.

Petitioner's claim of entitlement to constitutional due process requirements is a non-frivolous allegation regarding the Board's jurisdiction. Moreover, petitioner's discovery request sought information that was essential to establishing the facts necessary to invoke the Board's jurisdiction. Accordingly, the administrative judge should have required OPM to provide responses to petitioner's discovery requests insofar as they touched upon this jurisdictional issue and should have granted petitioner a hearing on the limited issue of Board jurisdiction over his appeal.

IV. THE FACT-FINDER'S REPORT SHOULD BE ADMITTED INTO THE RECORD BECAUSE IT IS DISPOSITIVE ON THE ISSUES BEFORE THE BOARD

Under the Board's regulations, once the record closes, no additional evidence or argument will be accepted unless the party submitting the evidence shows that it was not readily available before the record closed, despite due diligence. 5 C.F.R. § 1202.114 (i); Avansino v. United States Postal Service, 3 M.S.P.B. 308 (1980). In addition, the Board will not grant a motion to reopen the record for submission of new evidence absent a showing that the new evidence is of sufficient weight to warrant an outcome different from the initial decision. Russo v. Veterans Administration, 3 M.S.P.B. 427 (1980).

In this case, to the extent that the Fact-Finder's decision may be considered evidence that is not already in the record in this case, it meets the requirements, for submission after the close of the record. The Fact-Finder's Report is attached hereto as Appendix E.

First, the Fact-Finder's Report was never considered by the administrative judge because, though submitted as a supplemental decision, it crossed in the mail with the initial decision. Due to the

timing of petitioner's receipt of the Fact-Finder's Report and the issuance of the initial decision, it was impossible for petitioner to have submitted this document in time for it to be considered by the administrative judge, even though it was submitted as soon as practicable after it was obtained from the agency.

Second, the Fact-Finder's Report should be considered by the Board because it is dispositive on the issue of whether petitioner's internship should have terminated. In the Report, Mr. Kaplan, the fact-finder, determined that the agency erroneously extended petitioner's PMI appointment for an additional year in violation of Chapter 362 of the FPM. Further, Mr. Kaplan found that based upon his satisfactory performance during the period of the PMI appointment, petitioner should have been converted to career status as of August 24, 1989.

Clearly, had the agency not acted improperly in extending petitioner's PMI appointment, he would have been converted to career status more than a year ago, and would not have been subject to termination. Thus, the Fact-Finder's Report supports petitioner's position that he had a reasonable expectation of continued employment based upon his satisfactory performance as a PMI and his right, as of August 1989, to be converted to career status.

CONCLUSION

The Merit System Protection Board Opinion and Order of February 28, 1991 erred in concluding, as a matter of law, that it had no jurisdiction to entertain petitioner's request that his termination from employment be reviewed. The administrative judge and the Merit System Protection Board erred when they found petitioner's PMI employment to have been "temporary with an expiration date of an appointment . . . specified." This erroneous finding resulted in misapplication of the law. There exist independent basis for this court to reverse the Merit System Protection Board and direct that a hearing be held to determine whether the agency's termination action comported with law and regulation and whether agency's said action is supported by substantial evidence on the record.

The law requires a hearing when there is an expectancy of continued employment. The expectancy in the case before the court is rooted in no less than Office of Personnel Management's directions and regulations, FPM Chapter 362, which requires a notice and a hearing as to whether petitioner's work performance was satisfactory, i.e. requires adverse action before termination. For the Merit System Protection Board to decide otherwise contravenes the law and the record of evidence.

Accordingly, the petitioner respectfully prays of this court that it reverse the Merit System Protection Board and direct that a hearing on the merits be held regarding petitioner's termination, by reversing the Merit System Protection Board on jurisdiction, or alternatively, reversing and remanding so that a fact-finding, evidentiary hearing be held on whether the Merit System Protection Board has jurisdiction to consider petitioner's termination, as and under the PMI program and those objectively verifiable expectancies communicated to Petitioner, or as a preference eligible combat disabled veteran.

Respectfully Submitted,

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Petitioner
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APPENDIX B-2

October 9, 1991

United States Court of Appeals
for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, N.W.
Washington, D.C. 20439

Docket No 912-3256

Richard C. Soehngen,
Pro Se Petitioner

v.

Merit System Protection Board
Respondent

Petition for Rehearing

I, Richard C. Soehngen, Pro Se Petitioner, respectfully Petition for Rehearing of the September 26, 1991 decision and opinion affirming the MSPB's decision denying that petitioner's termination was an appealable adverse action within the Board's jurisdiction.

Petitioner respectfully submits that the Court misrepresented the facts when it concluded in it's opinion "that OPM's failure to continue his employment was an adverse action appealable to the MSPB". To the contrary, petitioner has consistently argued in his Briefs and reply letters to this Court and MSPB that it was the Department of Justice, as the direct employing agency of record for petitioner's Presidential Management Internship, that failed to convert without cause from career conditional status to a career appointment. The Court is in

error in its Decision by stating that it was OPM that did not further extend Petitioner's employment.

In short, petitioner has never asserted that it was OPM's responsibility to convert petitioner to career status as the Court's opinion states. In fact, it has been the U.S. Department of Justice (not OPM) which has been the agency of record throughout this case.

Further, the Court states in it's Decision "term appointment". The Court and the MSPB failed to take into account evidence (appointment letter and personnel actions) which specifically defines the Presidential Management Internship appointment as career conditional with no term limitations in Petitioner's tenure group. There is no statutory authority that defines Petitioner's tenure as temporary. Additionally, it is not evidenced anywhere in the record that Petitioner's appointment would expire August 24, 1990.

It is incorrect as the Court states that "It is true the OPM directions and regulations cited by Soehngen are not crystal clear in expressing their intent or application". Contrary to this assertion by the Court, Petitioner respectfully argues and submits that the applicable Department of Justice and OPM regulations (Chapter 362 of the FPM) governing the Presidential Management Internship Program are quite direct and clear by any reasonable standard regarding the stated intent of each applicable section. Regrettably, it must now be vigorously argued that it is the Court's own opinion which is not "crystal clear." Since the Court appears to be in doubt regarding the stated intent of the applicable regulations, perhaps the Court would find it instructive to reschedule a hearing and hear oral argument regarding it's apparent confusion concerning the regulation's intent.

The Court and the MSPB also substantially errs and misrepresents the Petitioner's position when it states "the interpretation urged by Soehngen would, regarding jurisdiction, treat an extension of a PMI appointment for a third year as though the extension itself created a permanent employment position." Please refer to Appendix D in Petitioner's brief, FPM Letter 362-3, Significant Changes in the Presidential Management Intern Program

as the Result of Executive order 12364, which clearly states in paragraph 10, "At the conclusion of the third year, assuming satisfactory performance, they WILL be converted to career appointments". This is a clear and precise statement. There is no record of unsatisfactory or poor performance in my three years of honorable service.

Further, according to the U.S. Code governing veterans preference, the Court and the MSPB both have failed to acknowledge the statutory right to a hearing for a 70-percent combat disabled veteran, referred to as a Special Compensatory, which establishes the right to a hearing before a termination notice can be served. Petitioner is entitled to this right. These issue are not merely technicalities. The Court should remand the case to the MSPB for a full evidentiary hearing to decide these issues fairly and impartially.

Further, the Court's Decision and Opinion is inaccurate as a matter of fact and as a matter of law. Both the Court's decision and opinion are unsupported by the substantial evidence of sworn testimony on record that was presented to the MSPB and to the Court itself. To-wit, the Fact-Finder's Report and Recommendations, Appendix E of Petitioner's Brief (over 550-pages of sworn transcript) shows conclusively:

1. The basis for Judge Robie's hasty and ill-considered request to extend Petitioner's PMI Internship for a third year in May, 1989 based on the "sudden" necessity of completion of a background investigation (BI) and need for additional training was found to be blatantly and pretextually false on both counts. The record shows that it was the U.S. Department of Justice itself that had requested Petitioner's BI be discontinued on January 13, 1988, two days after Petitioner had joined the Department. The record also shows that the Department only reopened the BI on June 28, 1990 one week after Petitioner had been notified that his PMI internship would be extended - and only after he had vigorously protested this matter directly to the agency after almost two years of employment.

Similarly, the factfinder who had been appointed by the Department of Justice, found the need for additional training to

have been blatantly pretextual and totally unpersuasive, despite the testimony of Judge Robie and Judge Mohan.

2. In addition, the factfinder found that the U.S. Department of Justice (not OPM) had violated Chapter 362 of the FPM when it had hastily requested the extension with blatantly pretextual justification and without any training plan in place for the third year as required by regulation.

Further, the fact-finder's recommendation; after three full days of sworn testimony, was that Petitioner be retroactively converted to a career service position as of August 24, 1989.

Thus, the MSPBs refusal to hold a fair and full evidentiary hearing to determine jurisdiction on these facts diligently collected in open and impartial sworn testimony represents a grievous breach of judicial review. The MSPB's failure to hold an evidentiary hearing constitutes harmful reversible error which the Court should not now ignore.

Respectfully, Petitioner prays that the Court will now recognize that it has relied on incomplete eveidence (or failed review all evidence presented and not addressed the legal significance of the controlling regulations (Chapter 362 of the FMP which oversee Executive Order 12364) or checked for legal or factual accuracy in rendering it's initial opinion and decision.

Therefore, Petitioner respectfully requests the Court will remand this case to the MSPB for a hearing regarding the significant jurisdictional issues involved.

Respectfully,

Richard C. Soehngen,
Petitioner Pro Se

CERTIFICATE OF SERVICE

I certify that this Petition for Rehearing was sent today by Regular

First Class Mail to:

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Dated October 9, 1991

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NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

91-3256

RICHARD C. SOEHNGEN,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: September 26, 1991

Before ARCHER, MICHEL, and PLAGER, Circuit Judges.

PER CURIAM.

DECISION

Richard C. Soehngen received a two year Presidential Management Intern (PMI) appointment. His appointment was later extended one year. When the appointment expired, the Office of Personnel Management (OPM) did not further extend Soehngen's employment. Soehngen appealed to the Merit Systems Protection Board (MSPB or Board). The MSPB concluded that the decision to allow a term appointment to expire was not an appealable adverse action within the Board's jurisdiction. We affirm.

OPINION

Soehngen argues that he had a reasonable expectation of continued employment, beyond the termination date of his PMI appointment. Soehngen concludes that OPM's failure to continue his employment was an adverse action appealable to the MSPB.

It is true that the OPM directions and regulations cited by Soehngen are not crystal clear in expressing their intent or application. However, the interpretation urged by Soehngen would, regarding MSPB jurisdiction, treat an extension of a PMI appointment for a third year as though the extension itself created a permanent employment position. The record demonstrates that the MSPB has consistently rejected this argument. See also 5 U.S.C. § 7512 (1988); 5 C.F.R. § 752.401(b) (11) (1991).

The legal standard by which the Federal Circuit reviews decisions of the MSPB is that a decision must be affirmed unless it is found to be:

1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

2) obtained without procedures required by law, rule or regulation having been followed; or

3) unsupported by substantial evidence.

See 5 U.S.C. § 7703. In light of this standard of review and of the facts in this case, we have no doubt that the Board's decision must be and is hereby affirmed.

91-3256

APPENDIX C

United States Court of Appeals for the Federal Circuit

91-3256

RICHARD C. SOEHNGEN,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

ORDER

ORDER

Before ARCHER, Circuit Judge, MICHEL, Circuit Judge, and PLAGER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The mandate will issue on October 31, 1991.

FOR THE COURT,

Dated: October 24, 191

Francis X. Gindhart
Clerk

cc: RICHARD C. SOEHNGEN
ANITA MARSHALL

SOEHNGEN V MSPB, 91-3256
(MSPB - CD7529010604)

****

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

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APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DC07529010604

RICHARD C. SOEHNGEN,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: FEB. 28, 1991

Steven L. Murray, Neill, Mullenholz & Shaw, Washington, D.C., for the appellant.

Mary E. Magee, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the October 16, 1990 initial decision that dismissed his petition for appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.117, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

The appellant filed a timely petition for appeal, alleging that the August 24, 1990 expiration of his appointment as a GS-11 Presidential Management Intern (PMI), Executive Office for Immigration Review, Office of the Chief Immigration Judge, constituted retaliation for his having engaged in whistleblowing activities, and that it therefore violated 5 U.S.C. § 2302(b) (8). The administrative judge issued an initial decision in which she found that the appellant served in a temporary appointment that expired in accordance with its scheduled termination date. She then ruled that, in cases where an expiration date of an appointment is specified as a basic condition of employment, the expiration of the appointment is not an adverse action appealable to the Board.

Further, the administrative judge found that the Board lacked jurisdiction to consider the appellant's claim of retaliation for alleged whistleblower activity as an affirmative defense because it was not raised in connection with an otherwise appealable action, and that it lacked jurisdiction to consider claim as an individual right of action appeal under the Whistleblower Protection Act of 1989 because the appellant had not show that he first sought corrective action from the Special Counsel regarding the matter. See 5 U.S.C. §§ 1214 (a) (3), 1221 (a); 5 C.F.R.§ 1209.2 (b)

(1).[11] The administrative judge therefor dismissed the appeal for lack of jurisdiction.

The appellant has filed a timely petition for review, asserting that the administrative judge erred by dismissing his appeal on jurisdictional grounds. In addition, the appellant has submitted alleged "new and material evidence" that he claims is dispositive of the issue before the Board. See 5 C.F.R. § 1201.115. The agency has timely responded in opposition to the petition for review.

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[11] On July 6, 1989, the Board republished its entire regulations on and interim basis, 54 Fed. Reg. 28,632 (1989) and on December 29, 1989, it republished part 1201 of those regulations on a final basis, 54 Fed. Reg. 53,500 (1989). See also 55 Fed. Red. 548 (1990) (correcting errors in publication of part 1201). For ease of references, we refer in this Opinion to the Board's regulations at 5 C.F.R. parts 1201 and 1209. For regulations relating specifically to the Whistleblower Protection Act of 1989, however, the parties must refer to 54 Fed. Reg. 28,632 (1989), 54 Fed. Reg. 53,500 (1989), and 55 Fed. Reg. 548 (1990). They also should refer to those sources for the precise text of other Board regulations.

ANALYSIS

Chapter 362 of the Federal Personnel Manual (FM) provides that PMI appointments, such as the one at issue her, are not to exceed 2 years unless they are extended by the Office of Personnel Management (OPM) for 1 additional year. See Appeal File (AF), Vol. 1 Tab 1, Attach. 1 a. It is undisputed that the appellant served for 2 years in his PMI appointment, that the agency then sought and obtained OPM's permission for a 1-year extension, and that the appellant's appointment expired, as scheduled, at the end of the third year. As the administrative judge correctly stated, "when an expiration date of an appointment is specified as a basic condition of employment, the expiration of the appointment is not an adverse action appealable to the Board." Initial Decision 3. *See Berger V. Department of Commerce, 3 M.S.P.R. 198,199-200 (1980).*

The appellant argues in his petition for review that the administrative judge erred by rejecting his claim below that: (1) He was subjected to a removal action, and was thus entitled to the adverse action procedures of Chapter 75, Title 5, United States Code; and (2) he had a reasonable expectation of continued employment, and was thus entitled to procedural due process upon the termination of his appointment. We find that the administrative judge thoroughly adjudicated these issues below, that the appellant's repeated arguments constitute his mere disagreement with her findings and conclusions, and they do not warrant Board review. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-43 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The appellant also argues that the administrative judge erred by denying his request for a hearing. There is no statutory requirement that the Board hold a hearing on the threshold issue of jurisdiction. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427 (FEd. Cir. 1984). The statutory provision concerning hearings on appeals to the Board, 5 U.S.C. § 7701 (a), provides a right to a hearing on the merits, but only after jurisdiction has been properly invoked. It is appropriate for the

Board to hold a hearing where the appellant's allegations raise non-frivolous issued of fact relating to jurisdiction that cannot be resolved simply on the basis of documentary evidence. Id. at 1427028. In the present case, the appellant did not raise a non-frivolous claim of jurisdiction.[12]

Accordingly, we find that the administrative judge did not err denying the appellant's request for a hearing on the issue of jurisdiction over the appeal.[13] *See O'Neal v. United States Postal Service*, 39 M.S.P.R. 645, 649 (1989).

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[12] The appellant also alleges that the administrative judge erred, under *Burgess v. Merit Systems Protection Board*, 758 F.2d 641,643 (Fed. Cir. 1985), by failing to give him adequate notice of what was required to establish Board jurisdiction. There is no merit to this contention. The order acknowledging the appellant's petition for appeal specifically informed the appellant that jurisdiction was questionable because he was seeking to challenge the expiration of a temporary appointment. Appeal File (AF), Vol 1, Tab 2. The appellant addressed this very issue in his 8-page response brief, *id.*, Tab 3, and he has added nothing substantive, in his petition for review, to the legal arguments he presented on that issue below. Petition for Review File, Tab 1.

[13] The appellant also argues that the administrative judge erred by failing to rule on his motion to compel discovery from OPM, a nonparty, regarding the number of PMI appointments that were converted to career appointments or were terminated since September 1980. AF, Vol. 1, Tab 8. Inasmuch as the appellant's own PMI was not converted to a career appointment, but remained temporary until it expired, the appellant's discovery request did not cover evidence material to this appeal. Thus the administrative judge's failure to rule on his motion to compel had no effect on his substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

Finally, the appellant has resubmitted a copy of the October 2, 1990 Fact-Finder's Report and Recommendations (Report) that the agency issued in his favor, pursuant to a grievance he had filed to contest the agency's extension of his PMI appointment for a third year. Petition for Review File, Tab 1, Ex. A. The appellant hand-carried this document to the administrative judge below on October 16, 1990, subsequent to the September 25, 1990 close of record on the issue of jurisdiction. *See AF*, Vol. 2, Tabs 2, 10. The administrative judge issue her initial decision that same day, however, and evidently did not consider the Report. *See* AF, Vol. 2, Tabs 9.

The Report addresses the issues of whether the agency violated Chapter 362 of the FPM and/or committed reprisal for the appellant's filing of a grievance when it extended his PMI appointment for a third year. [14] At issue in this appeal, however, is whether the agency's action in releasing the appellant from employment upon the termination of his temporary PMI appointment is an action that is appealable to the Board. We therefore find the Report does not warrant an outcome different from that of the initial decision, and that it accordingly is not "material. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345,349 (1989). In light of this finding, we need not determine whether the Report is "new." *See* 5 C.F.R. § 1201.115; *Avansino v. United States Postal Service, 3 M.S.P.R. 211, 214 (1980). (the Board will not consider evidence submitted for the first time with*

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[14] The Report's recommended findings are that the agency did violate Chapter 362, but did not commit reprisal, when it extended the appellant's PMI appointment. As relief, the Report recommends that the appellant be retroactively converted to a permanent civil service career position, effective August 24, 1989. Petition for Review File, Tab 1, Ex. 1. The Board, however, has not been presented with an appeal from an action removing the appellant from such a position.

the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal, *See* 5 C.F.R. § 1201.113(3).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* U.S.C. § 7703 (a) (1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs firs. *See* 5 U.S.C. § 7703 (b) (1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

WASHINGTON, D.C.

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD C. SOEHNGEN, Appellant,	DOCKET NUMBER DC07529010604
v.	
U.S. DEPARTMENT OF JUSTICE, Agency.	

APPELLANT'S SUBMISSION ON THE ISSUE OF JURISDICTION

INTRODUCTION

Appellant, Richard C. Soehngen, by and through his counsel, Neill, Mullenholz & Shaw, hereby submits this Submission on the Issue of Jurisdiction, pursuant to the Acknowledgement Order, issue on August 31, 1990.

SUMMARY OF FACTS

Mr. Soehngen entered the Presidential Management Intern (PMI) program on August 24, 1987, as a program analyst in the Military Traffic Management Command in Falls, Church, Virginia. This position was in the Department of Army. As a result of Mr.

Soehngen's competitive entry into the PMI program on August 24, 1987, his conversion date to the civil service was August 24, 1989.

Mr. Soehngen served in the initial position from approximately August 24, 1987 through January 11, 1989. At that time, Mr. Soehngen transferred to the U.S. Department of Justice (DOJ) to assume a position as management officer. Mr. Soehngen occupied the position of management officer in the agency from January 11, through July 31, 1988.

In a letter from Judge William R. Robie, Chief Immigration Judge in the Executive Office for Immigration Review, DOJ, from Mr. Soehngen, dates June 10, 1988, Mr. Soehngen was offered the position of program analyst in the Criminal Alien Unit (CAU) of the Office of Chief Immigration Judge (Attachment 3).[1] Upon entry into the program, Mr. Soehngen's grade level was GS-9. Within approximately two weeks after assuming the position in August 1988, Mr. Soehngen was promoted to the GS-11 level.

In a letter, dated May 23, 1989, from Warren Oser, Director of Personnel, DOJ, to Ms. Patricia Paige, Chief, Programs Division, Office of Personnel Management, the agency requested OPM's official approval of the agency's extension of Mr. Soehngen's PMI for a third year (Attachment 7). In response to the May 23, 1989 letter, Ms. Paige submitted a letter to Mr. Oser, dated May 26, 1989, approving the agency's request for an extension of Mr. Soehngen's PMI internship into a third year (Attachment 8).

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[1] On August 24, 1990, Mr. Soehngen filed his initial request for stay. A copy of the request for stay was filed in conjunction with the appeal at issue on August 28, 1990. The request for stay and the attachments filed in conjunction with the stay request were incorporated in the appeal and are incorporated and referenced herein this submission. The references to "Attachments" herein refer to the attachments filed in conjunction with the stay request. The references to "Exhibits" herein refer to the documents attached to this pleading.

At the time of the personnel action at issue, Mr. Soehngen was a program analyst in the CAU in the Office of Chief Immigration Judge, in DOJ. He was employed in the Presidential Management Intern (PMI) program. On August 14, 1990, Mr. Soehngen received a request for personnel action notifying him of the "termination-expiration of appointment" concerning his PMI ("personnel action"). The effective date of the termination-expiration of appointment was August 24, 1990. The request for personnel action constitutes both the notice and decision of the termination at issue (Attachment 1). Mr. Soehngen filed his appeal with the Board on August 28, 1990.

ARGUMENT

A. Mr. Soehngen Has Appeal Rights.

The Board has jurisdiction to accept and decide Mr. Soehngen's appeal. Mr. Soehngen satisfies the statutory definition of an "employee" under 5 U.S.C. § 7511 (a)(1)(B). He is a preference eligible employee who completed one year of current continual service in the same of similar position. Mr. Soehngen is also a preference eligible compensatory disabled veteran, defined as a special disabled veteran under 38 U.S.C. § 2011. Furthermore, Mr. Soehngen's appeal is supported by 5 C.F.R. § 720.301 (1990) (Disabled Veterans Affirmative Action Program), and 38 U.S.C. § 2014, providing that the policy of the United States is to promote the maximum of employment and job advancement opportunities within the federal government for qualified disabled veterans and veterans of the Vietnam era.

Mr. Soehngen has been the subject of an adverse action. Mr. Soehngen's termination is essentially a removal under 5 U.S.C. § 7512 and such an action is appealable to the Board.

The Federal Personnel Manual (FPM) concerning the Presidential Management Intern (PMI) program provides in Chapter 362, Section 2-8, that the employing agency may convert the intern to the competitive service or extend the internship with prior approval from OPM. If neither of these actions is taken, the PMI appointment terminates. For preference eligible employees, as

defined in 5 U.S.C. § 7511 (a)(1)(B), removal actions are subject to the requirements relating to adverse actions provided at 5 U.S.C. § 7513. Furthermore, Section 2-8 of Chapter 362 of the FPM provides that an agency may not remove an intern based on a prohibited personnel practice listed in 5 U.S.C. §2302(b) Attachment 1a).

The Board in Shelton v. Federal Deposit Insurance Corporation, 38 M.S.P.R. 303 (1988), held that separation of an employee in the temporary excepted service, which occurred when the agency allowed the temporary appointment to expire on its expiration date, was not a removal entitling the employee to appeal rights, even though the employee was a preference eligible employee. Mr. Soehngen's present action is distinguishable from Shelton because Mr. Soehngen's had a clear expectation of continued employment in the PMI program.

FPM 362 provides that PMI interns have an expectation of continued employment. Chapter 362 provides that an employee has an expectation of conversion as long as the employee has performed satisfactorily in the agency. See FPM Chapter 362, Sections 2-7 and 2-8. In addition, section 2-8 of FPM Chapter 362 provides that the termination actions shall be consistent with the objectives of the PMI program to select, develop, and retain for the federal service outstanding employees for careers in public sector management, and that terminations must be preceded by a full and careful review process. Furthermore, Section 2-8 of FPM Chapter 362 provides that for preference eligible employees, removal at 5 U.S.C. § 7513 (Attachment 1a).

In a letter to Mr. Soehngen, dated June 10, 1988, in which Judge Robie offered Mr. Soehngen's the position of program analyst in the CAU of the Office of Chief Immigration Judge, Judge Robie stated: "You can expect to be promoted to GS-11/1 when you become eligible (PMI entry date on duty date, August 23, 1987). Longer term career development potential to the GS-12 (at internship conclusion) and GS-13 levels based on job performance are associated with this position at OCIJ" (Attachment 3). This letter establishes the expectation that Mr. Soehngen would

have continued employment in the PMI program as long as his performance was successful.

Mr. Soehngen had a reasonable expectation of continued employment because the agency approved a performance work plan for Mr. Soehngen on June 20, 1990 (Exhibit 1). This plan covered the period of June 20, 1990 through March 31, 1991. Moreover, in February 1990, the agency approved nine training courses for Mr. Soehngen to attend (Exhibit 2a). In the period of February to August 1990, Mr. Soehngen successfully completed seven of the nine courses, the two remaining courses were canceled by the OPM. In fact, Mr. Soehngen completed his last training course on August 22, 1990, subsequent to the date, August 14, 1990, on which he was advised of the personnel action at issue (See, Exhibit 2 - Mr. Soehngen's Synopsis of Training).

It is unreasonable to conclude that Mr. Soehngen was in a temporary position when he provided services to the agency under a performance work plan and training schedule which remained in effect past the period of time on which he was advised of his termination. Furthermore, it is unreasonable to conclude that Mr. Soehngen was a temporary employee in light of the fact that the agency provided Mr. Soehngen with such a significant degree of training.

Throughout Mr. Soehngen's service in the PMI program, his performance has been found to be fully successful by agency officials. Since 1988 until his termination, Mr. Soehngen's direct supervisor has been Assistant Chief Immigration Judge Mary Ann Mohan. Mr. Soehngen's first discussion with Judge Mohan regarding a performance review was January 1989. In this mid-term performance appraisal, Judge Mohan stated to Mr. Soehngen that he had received an excellent or an outstanding rating. Thereafter, on April 25, 1989, Judge Robie provided Mr. Soehngen with a letter of recommendation for law school (Attachment 4). Shortly thereafter, on May 3, 1989, Mr. Soehngen received a formal performance rating for the rating period of September 1, 1988 through March 31, 1989 (Attachment 5). Judge Mohan signed this document on April 25, 1989, as a rating official and

Judge Robie signed this document on April 26, 1989, as a reviewing official. Mr. Soehngen's rating was fully successful.

The permanent nature of Mr. Soehngen's appointment is also established by the request for personnel action forms admitting Mr. Soehngen to the PMI program and the request for personnel action reflection his initial employment with the Department of Justice. On both forms, the code under block 18-A, NOAC, is #170. Upon information and belief, this code reflects a permanent appointment pursuant to Department of Justice Personnel Guide to Processing Action, FPM Supplement 296-33, Chapter 11. Moreover, this coding is consistent with FPM Chapter 362. Furthermore, on both requests, there is no reference to any "not to exceed" date in block 18-8, reflecting the nature of appointment (Attachments 1b and 1c).

On the request for personnel action hiring Mr. Soehngen into the PMI program in August 1987 (Attachment 1b) and the notification of personnel action indicating Mr. Soehngen's hire into the Executive Office for Immigration Review (Attachment 1c), it is indicated that Mr. Soehngen's tenure status is that of Group 2 (See, Block No. 7 on Attachments 1b and 1c). **Group 2 is defined to include those employees who serve "under conditional appointments which automatically lead to full tenure after a prescribed time and without further qualification" (Exhibit 3, second side - attached to this pleading).**

B. Agency Committed Harmful Reversible Error.

As set forth above, in FPM Chapter 363, Mr. Soehngen has appeal rights as a preference eligible for the adverse action at issue. In Blalock v. Dept. of Agriculture, 28 M.S.P.R. 17 (1985), the Board held that preference eligible employees have a right to appeal from removal and that the absence of the procedures required by 5 U.S.C. § 7513 constitutes harmful error necessitating reversal of the action under 5 U.S.C. § 7701 (c) (2) (A). Therefore, Mr. Soehngen is entitled to be provided with the procedures required by 5 U.S.C. § 7513. The agency's failure to provide such procedures constitutes reversible error.

CONCLUSION

The for reason set forth herein, Mr. Soehngen has appeal rights to the Board and the Board has appropriate jurisdiction over this appeal.

Respectfully submitted,

William L. Bransford
Steven L. Murray
Neill, Mullenholz and Shaw
815 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 463-8400

91-1264

(3)

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

No._____

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner,

v.

Merit System Protection Board,

Respondent.

APPENDICES

VOLUME III OF V VOLUMES

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153
(703) 720-0315

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VOLUME III OF V

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G. AGENCY FACT-FINDER'S REPORT AND RECOMMENDATIONS OCTOBER 2, 1990 BY MR. ROGER KAPLAN, ESQUIRE, DOJ APPOINTED FACT-FINDER (BASED ON A VERBATIM RECORD OF PROCEEDINGS TAKEN BY A CERTIFIED COURT REPORTER DURING AN EVIDENTIARY HEARING CONDUCTED ON MAY 30, MAY 31, AND JUNE 16, 1990, ATTENDED BY THE HONORABLE CHIEF IMMIGRATION JUDGE WILLIAN R. ROBIE, THE HONORABLE ASSISTANT CHIEF IMMIGRATION JUDGE MARY ANN MOHAN, PETITIONER, AND OTHER WITNESSES.) 4

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APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD C. SOEHNGEN, Appellant,	)	DOCKET NUMBER DC07529010604
v.	)	
U.S. DEPARTMENT OF JUSTICE Agency,	)	

APPELLANT'S SUPPLEMENTAL
SUBMISION TO THE RECORD

Appellant, Richard C. Soehngen, by and through his counsel, Neill, Mullenholz & Shaw, herby submits the Fact-Finder's Report and Recommendations, Roger P. Kaplan, Eq., Fact-Finder (Report).

The Report is submitted for inclusdion in the record because the Report is directly relevant to the issue pending before the Administrative Judge concerning Mr. Soehngen's appeal filed on or about August 28, 1990. The Report is relevant concerning the following issues:

1. The issue of jursidiction pending before the Administrative Judge.

2. The appellant's position that he has appeal rights in this proceeding.

3. The appellant's position that he has a reasonable expectation of continued employment.

4. The appellant's position that he was denied his due process rights because the agency removed him from his position without providing him the procedures required by 5 U.S.C. § 7513.

The report found that the agency violated FPM Chapter 362 by extending Richard Soehngen's Presidential Management Internship (PMI) for a third year (Report, p. 17). The report recommended that Mr. Soehngen be retroactively converted to a career civil service position at the GS-11 level as of August 24, 1989 (Report, p. 17)

The Report resulted from a full evidentiary and adversary hearing held on May 30 and 31, 1990, and June 18, 1990. In this hearing, both parties had the opportunity to examine and cross-examine witnesses, introduce documents and exhibits, and present evidence in support of their respected positions. A verbatim transcript was made of the hearings and the parties submitted post-hearing briefs on or about July 16, 1990.

The Report should be given substantial weight in terms of developing the evidentiary and legal issues surrounding the issue of Mr. Soehngen's right to be converted in the PMI program. As a result of the PMI program, Mr. Soehngen had a legitimate expectation of continued employment in the PMI program. Mr. Soehngen had a legitimate expectation of being lawfully converted to a permanent position on or about August 24, 1989, after two years in the program. Therefore, but-for the agency's unlawful conduct in failing to convert Mr. Soehngen on August 24, 1989, Mr. Soehngen would have been converted and would have been entitle to all procedural and substantive rights provided to career civil service employees.

The Report support's Mr. Soehngen's claim that he had a legitimate expectation of continued employment. This expectation is based on the conduct of ageny officials, Mr. Soehngen's successful performance in the PMI program, the nature of the PMI program, and the significance of the agency's unlawful failure to convert Mr. Soehngen in August 1989. In light of the above, the Report is relevant converning all of the issues addressing herein.

The submission of the Report will not prejudice the agency because the agency was a party represented by counsel throughout the fact-finding procedures at issue in the Report.

Wherefore, for the aforementioned reasons, the appellant respectfully requestes the attached Report be included in the record for consideration surrounding all of the issues pending before the the Administrative Judge concerning Mr. Soehngen's appeal, including but not limited to the issue of jursidiction.

Respectfully submitted,

William L. Bransfod
Steven L. Murray
Neill, Mullenholz and Shaw
815 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 463-8400

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE

In the Matter of:	)
	)
RICHARD C. SOEHNGEN,	)
Grievant	)
	)
and	)
	)
UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW	)
	)
Agency	)

FACT-FINDER'S REPORT AND RECOMMENDATIONS
ROGER P. KAPLAN, ESQ., FACT-FINDER

APPEARANCES:

For Richard C. Soehngen:	Steven L. Murray, Esq. William L. Bransford, Esq.
For U.S. Department of Justice:	Mary E. McGee, Esq. Kenneth C. Kohl, Esq.

BACKGROUND

Pursuant to Department of Justice Order DOJ 1771.1B, Mr. William C. Owen,Assistant Director of Personnel, U.S. Department of Justice (Agency) designated the undersigned as the Fact-Finder to conduct an inquiry into the grievance filed by Mr. Richard C. Soehngen (Grievant). The grievance was processed in accordance with the provisions of Title 5, Code of Federal Regulations, Part 71 and Department of Justice Order DOJ 1771.1B.

On May 29, 1990, the Fact-Finder held a pre-hearing conference. Hearings were held on May 30 and 31, 1990 and June 18, 1990 in Washington, D.C. Both parties had the opportunity to examine and cross-examine witnesses, introduce documents and exhibits and present evidence in support of their respective positions. A verbatim transcript was made of the hearings. The parties submitted post-hearing briefs on approximately July 16, 1990. On that same date, the Grievant filed a Motion to Strike based upon two attachments submitted by the Agency with their post-hearing brief. On August 1, 1990, the Agency submitted an Opposition to the Motion to Strike.

ISSUE

The parties agreed upon a stipulation of two issues. They are:

1. Did the United States Department of Justice (Agency) violate Chapter 362 of the Federal Personnel Manual (FPM) by extending Richard Soehngen's Presidential Management Internship (PMI) for a third year?

2. Whether the PMI extension was an unlawful reprisal for Mr. Soehngen having filed an initial grievance on approximately May 12, 1989 on his performance appraisal?

FACTS

Richard Soehngen is employed as a Program Analyst, GS-301-11, in the Criminal Alien Unit in the Office of the Chief Administrative Law Judge. The office is part of the Executive Office for Immigration Review of the United States Department of Justice, located in Falls Church, Virginia. Soehngen is employed in the Presidential Management Intern (PMI) program.

Soehngen entered the PMI program on August 24, 1987 as a Program Analyst in the Military Traffic Management Command, United States Department to the Army in Falls Church, Virginia. He occupied this position until January 11, 1988.

On October 27, 1987 and November 15, 1987, Soehngen interviewed for a position in the Executive Office for Immigration Review, U.S. Department of Justice with Chief Immigration Judge William R. Robie. On approximately January 11, 1988, Soehngen transferred to the Agency to assume a position of Management Officer, GS-301-11 in El Paso, Texas. As a Management Officer for the El Paso Office, Soehngen served as the principal liaison in administrative and management matters with the Office of the Chief Immigration Judge. He was the first line supervisor in the El Paso Office. Soehngen has responsibility for the administrative handling of cases in his office. He was responsible for keeping track of the cases on the calendar of the administrative judges. Soehngen occupied the position of Management Officer in El Paso from January 11, 1988 through July 31, 1988.

The Agency needed a Program Analyst in its Falls Church Office. At the direction of Chief Judge Robie, Assistant Chief Immigration Judge Mary Ann Mohan considered Soehngen for this position. She interviewed Soehngen in Texas for the vacancy. On June 10, 1988, Chief Judge Robie offered the position of Program Analyst in the Criminal Alien Unit to Soehngen. In the letter, Chief Judge Robie stated:

> You will, of course, continue to participate in the Presidential Management Intern Program. You can expect to be promoted to GS 11/1 when you become eligible (PMI entry on duty date, August 23, 1987). Longer term

career development potential to the GS 12 (at internship conclusion) and GS 13 levels, based on job performance, are associated with this position at OCIJ.

Soehngen accepted the position of Program Analyst in the Falls Church Office and started working there in August, 1988. When he assumed the position of Program Analyst, his grade was GS-9. In approximately two weeks, on August 24, 1988, Soehngen was promoted to the GS-11 grade level. His present grade level remains at GS-11. From August 1988 until the present date, Soehngen's immediate supervisor has been Judge Mohan.

In his current position, Soehngen provides analysis for the Criminal Alien Program. This involves keeping reports and providing liaison with management offices in the field regarding the deportation hearing requirements at the different state and federal correctional institutions around the country.

On January 13, 1989, Judge Mohan conducted a progress review of Soehngen's work performance. There was no written documentation of that progress review. Mohan testified that she discussed with Soehngen the work plan, the caseload analysis and the reporting responsibilities that he was handling. Judge Mohan stated that she discussed with Soehngen areas in his work that needed improvement. Soehngen testified that the progress review was a very favorable and positive exchange. He claimed that Judge Mohan told him specifically that he would either receive an excellent or outstanding rating at the end of his performance appraisal period.

During the Spring of 1989, Soehngen applied to law school. On April 25, 1989, Chief Judge Robie wrote a letter of recommendation for Soehngen. In pertinent part, Chief Judge Robie stated as follows:

> . . . I have had an opportunity to see Rick's work and intellectual fervor since he joined the Executive Office for Immigration Review in January, 1988 . . . He has spend most of his time since July, 1988, assisting in the coordination and establishment of our hearing program for incarcerated aliens in corrections systems at the federal, state, and local levels. In particular, he has focused much

of his effort on the establishment of pro bono publico programs to assure that aliens are represented in these hearings. His concern and willingness to take that extra effort to assure that incarcerated aliens have access to legal counsel in these deportation proceedings have been particularly noteworthy.

On May 3, 1989, Soehngen received a formal performance rating for the period for September 1, 1988 through March 31, 1989. Soehngen received a fully successful rating. Judge Mohan signed the appraisal on April 26, 1989 as the rating official and Chief Judge Robie signed the appraisal on May 3, 1989 as the reviewing official. Judge Mohan rated Soehngen in four critical areas. Soehngen received a fully successful rating in each of these four areas. In her narrative portion of the appraisal, Judge Mohan described Soehngen's work performance as follows:

> Critical Element No. 1: During his employment in the Criminal Alien Unit, Mr. Soehngen has been assigned various caseloads at large and specific program-related issues to analyze. His grasp and understanding of the detailed and analytical techniques required to fully evaluate this program and his ability to accurately perform these analyses with ACIJ supervision are growing.
>
> Critical element No. 2: During 1988,much of Criminal Alien Unit staff time was devoted to working with corrections officials to establish and effectively monitor CAP operations on an individual program as well a collectively on a national level. Rick assisted with various elements on state program implementation, and his coverage of both the Federal Bureau of Prison and military installation sites in Leavenworth, Kansas was very helpful at an important time.
>
> Critical Element No. 3: Much of this initial period of employment with the Criminal Alien Unit required Rick to assimilate a great deal of knowledge and information

regarding program implementation techniques and operating level systems. His ability to analyze and integrate programmatic information was affected by this initial need to learn and apply the systems in place.

Critical Element No. 4: Rick's contact with EOIR field office personnel on CAP matters has focused primarily on serving as a conduit for Management Officers who require program assistance. He has also served as the principal Criminal Alien Unit liaison with Management Officers in developing a forms/supplies checklist for ready reference by EOIR personnel preparing for prison hearings.

After receipt of his performance appraisal, Soehngen voiced his concern to Judge Mohan. On May 12, 1989, Soehngen filed a request to Chief Judge Robie through Judge Mohan for a performance appraisal review. This request focused on two major points: (1) the performance rating of fully successful; and (2) the failure of Soehngen to receive a performance appraisal for the period from January 11, 1988 through July 31, 1988.

On May 31, 1989, Judge Mohan requested of Soehngen whether he intended his memorandum dated May 12, 1989 to be a grievance. On June 1, 1989, Soehngen indicated that he would proceed with the formal grievance process. He advised Chief Judge Robie that his May 12th memorandum should be considered a formal grievance.

The May 12th grievance was processed through the fact-finding procedures outlined in the Agency's regulations. On October 30, 1989, Jack B. Newman, Grievance Examiner, issued his fact-finding report. Newman found that there was no requirement for Soehngen to be rated for the period from March 1988 to June 1988. Newman also concluded that Soehngen's request for a higher appraisal rating be denied.

In late April, 1989, management officials of the Agency commenced a personnel action regarding an extension of Soehngen's PMI. Samantha Matus, a Personnel Liaison Specialist, testified that on approximately April, 1989, she discussed with

Judge Mohan about an extension of Soehngen's PMI. Matus stated that Judge Mohan asked her to check into the requirements for requesting an extension in Soehngen's case. Matus testified that she made two telephone calls to Jim Annandale in the Agency Personnel Office to discuss what specifics would be needed if an extension request was submitted from the Agency to the Office of Personnel Management (OPM).

Matus made personal notes, which reflected that on May 1 and May 8, 1989, she inquired into the procedures for requesting Soehngen's extension. Matus stated that she met with Judge Mohan and her immediate supervisor, Suzanne Carroll, on May 10, 1989, to discuss the contents of the letter being set to OPM for Soehngen's extension. Matus wrote a note to the file on May 10th, explaining what occurred at the meeting. She wrote:

> Met with Mary Ann Mohan & Suzy today (5/10/89) at 3:00 p.m. to discuss extension of PMI, Rick S., based on insufficient time in Program Analyst Position. Mary Ann Mohan was to develop memo, . . . to be submitted to OPM . . .

Matus stated that Judge Mohan drafted a letter that would be sent to OPM requesting Soehngen's extension. On May 23, 1989, Warren Oser, Director of Personnel for the Agency, requested OPM's approval of the Agency's extension of Soehngen's PMI for a third year. In pertinent part, Oser stated:

> At this time, EOIR had determined that the period of Mr. Soehngen's assignment to the Criminal Alien Unit is insufficient to warrant career conversion in a program analyst position. Additionally, Mr. Soehngen's background investigation, which was initiated in December, 1987, has not been completed. Due to the extremely sensitive nature of managing the Criminal Alien Program, which requires constant interaction with prison officials and prison systems, it is impossible to convert Mr. Soehngen absent successful completion of this essential investigation.

On May 26, 1989, Patricia Paige, Chief of the Programs Division, Office of Affirmative Recruiting and Employment, OPM, wrote to Oser informing him that the Agency's request for Soehngen's extension had been granted. On June 14, 1989, Chief Judge Robie wrote Soehngen, informing him that his PMI had been extended for a third year. Soehngen testified that he learned of the extension on June 21, 1989 when he received Chief Judge Robie's letter.

Soehngen was absent from work June 6, 1989 through November 29, 1989 due to an injury. Soehngen returned to work after November, 1980 for this third year in the PMI program. As of the present date, he is still in his third year of the PMI program.

Beverly Jones, Manager of the PMI Program at OPM, testified that she received the Agency justification for Soehngen's extension in late July or early August, 1989. She admitted that these documents were the only documents received from the Agency to justify Soehngen's extension. No documents accompanied the extension request in May 1989.

Based upon the inability of the parties to resolve this grievance, the undersigned was designated as the Fact-Finder, as stated in the initial part of this decision.

ANALYSIS AND DISCUSSION OF ISSUES

The parties stipulated to two issues at hearing. They will be discussed seriatim.

ALLEGED VIOLATION OF CHAPTER 362 OF THE FEDERAL PERSONNEL MANUAL

Chapter 362 of the Federal Personnel Manual (FPM) sets forth provisions regarding the PMI program within the Federal agencies.

Specifically, Chapter 362-6, Extending Presidential Management Internships, deals with the extension of employees within the PMI program.

This paragraph states as follows:

> 2-6. EXTENDING PRESIDENTIAL MANAGEMENT INTERNSHIPS
>
> Federal agencies may request OPM approval for an extension of an internship for up to a third and final year. The primary reason for extending on internship is to provide the intern with additional training and developmental activities. The additional training should be structured to allow the intern to successfully fill a changed or more demanding position. Extensions for a third year will be the exception rather than the rule.
>
> In requesting an extension for up to a third year, agencies must provide the following information:
>
> -- The target position for which the intern is being developed;
>
> -- An individual Development Plan for the intern during the third year which contains specific assignments and learning objectives;

-- The reason(s) why the intern is not able to receive this training during the first 2 years of the internship.

A written request to extend an internship should be submitted to PMIP, no later than 60 days prior to the end of the initial 2-year period. This request must be sent to:

U.S. OFFICE OF PERSONNEL MANAGEMENT
PRESIDENTIAL MANAGEMENT INTERN PROGRAM
P.O. BOX 7230
WASHINGTON, DC 20044

Interns serving a third year of the internship will remain under the Schedule A appointment. If at any time during the third year the agency determines that the intern has achieved the objectives of the extended internship and has performed satisfactorily, the agency may the convert the intern to career or career-conditional status. Interns converted before the completion of 3 years will receive career-condition appointments unless they have had any substantially continuous Federal service prior to their internship which would be qualifying for a career appointment. At the conclusion of the third year, assuming satisfactory performance, interns can be converted to a career appointment.

The Agency request to extend Soehngen's internship was dated May 23, 1989, more than two months prior to the conclusion of his PMI on August 24, 1989. FPM Chapter 362-6 states that the Agency must provide certain information when requesting an extension. It is undisputed that the Agency did not submit the required information when the extension request was submitted. Beverly Jones, OPM's Manager of the PMI program, testified that the Agency's justification for the extension was not received until late July or early August, 1989.

In its request to OPM for approval of Soehngen's PMI extension, the Agency provided two reasons for its request. First, the Agency claimed the period of Soehngen's assignment to the Criminal Alien Unit was insufficient to warrant career conversion in a program analyst position. Second, the Agency maintained that Soehngen's background investigation had not been completed. Chief Judge Robie's letter to Soehngen dated June 16, 1989, reiterates the reasons as to why the Agency requested an extension.

The Agency stated in this letter to OPM that successful completion of Soehngen's background investigation was essential to convert him in the PMI program. The Agency asserted that the background investigation was initiated in December 1987. It further alleged that the sensitive nature of managing the Criminal Alien Program, which required constant interaction with prison officials, made his completion of the background investigation a requirement. Chief Judge Robie stated that the failure of a background investigation to be completed for Soehngen was a factor in his decision for requesting an extension. Chief Judge Robie also testified that he did not know of any regulation which precludes Soehngen from being converted from the PMI program to a permanent position absent completion of a background investigation.

The evidence shows that Soehngen started working in the PMI program on August 24, 1987. In December, 1987, Soehngen's background investigation was initiated. On January 13, 1988, the Agency contacted OPM and instructed them to discontinue the background investigation. On June 29, 1989, the Agency requested OPM to reopen Soehngen's background investigation. As of September 29, 1989, James Scott, Chief of the File and Information Branch at OPM, indicated the reopened background investigation was still in progress.[1]

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[1] In its post-hearing brief, the Agency submitted an OPM printout, which indicated that as of May 23,1989, Soehngen's background investigation was in progress, which contradicts evidence submitted at hearing. The Agency also submitted Chapter

My consideration of the Agency's two attachments submitted in their post-hearing brief does not convince me of the validity of their position. The Agency's reliance on the failure of Soehngen to have completed a background investigation cannot be used as a reason to support the extension request. Assuming arguendo, that a background investigation was required by FPM Chapter 732 or the Agency's regulations, it would be unfair and unjust for the Agency to have considered this as a reason for the extension request.

First, the Agency had the responsibility for assuring that Soehngen's background investigation was completed prior to the conclusion of his internship, absent extenuating circumstances, Soehngen played no part in the completion of the background investigation. Second, the Agency initiated the background investigation in December 1987, almost two years prior to the completion of Soehngen's internship. For whatever reason, the Agency instructed OPM to discontinue the background investigation on January 13, 1988. For the Agency to maintain that a valid reason exists to extend Soehngen's internship because of his failure to complete a background investigation, when the Agency terminated the investigation, is incredible. Third, Jones, the OPM's Manager of the PMI program, testified that there was no requirement pursuant to Chapter 362 of the FPM that an employee complete a background investigation prior to conversion as a permanent employee. Jones made no reference to Chapter 732 of the FPM as requiring Soehngen to have completed a background

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732 of the FPM, which it claimed provided that a background investigation was required for employees in Soehngen's position. The Grievant filed a Motion to Strike to deny the Agency's submission of the above-cited attachments. The reference to FPM Chapter 732 and its submission is not evidence, but rather argument in which the Agency sought to rely that a background investigation was needed by Soehngen. The submission of an OPM printout is pertinent and will be considered for the sake of this grievance only. The Grievant's Motion to Strike is denied.

investigation. Also, Jones testified that the background investigation played no role in the decision to approve the Agency's request for Soehngen's third year under the PMI program.

Based upon the reasons set forth in the preceding paragraphs, I find the Agency's reliance upon failure of Soehngen to have completed a background investigation as a requirement for successful conversion to the competitive service is misplaced and unconvincing. Any reliance by Agency officials on Soehngen's failure to have completed a background investigation prior to conversion must be rejected because of the Agency's role in discontinuing the background investigation itself. Having unilaterally acted to discontinue the background investigation, it cannot in good faith claim at a later date that Soehngen's failure to have completed a background investigation constituted a justifiable reason for his PMI extension. This rationale is applicable whether or not there was an ongoing background investigation at the time the Agency requested approval of the PMI extension.

The second reason used to support the extension request was the Agency contention that the period of Soehngen's assignment in the Criminal Alien Unit was insufficient to warrant career conversion. Pursuant to FPM Chapter 362, the Agency was required to submit its reasons for the extension when the request was submitted on May 23, 1989. The Agency failed to comply with this provision in FPM Chapter 362. Therefore, OPM's approval of the Agency request on May 26, 1989, could not have been based upon any substantive reason. Since the Agency did not submit its rationale for extending Soehngen's internship until late July 1989, the OPM approval could not have considered the three reasons outlined in FPM Chapter 362-6. Therefore, I find that the OPM approval dated May 26, 1989 to be based upon insufficient reasons and not worthy of consideration.

Since I find OPM's approval letter of May 26, 1989 to be perfunctory, I must examine the reasons proffered by the Agency in its May 23, 1989 request to OPM and its justification submitted in July for approval. In my judgement, the Agency's rationale must be scrutinized to determine whether the reasons advanced for

the extension are valid. While FPM Chapter 362-6 outlines the requirements for requesting extension, FPM Chapter 362-7 outlines the reasons for eligibility for conversion. In pertinent part, the OPM sets forth guidelines for conversion:

> 2-7 CONVERSION
>
> b. Eligibility for conversion. Employees who have completed Presidential Management Internships are to be converted noncompetitively to a career or career-conditional appointment for which they are qualified if all of the following criteria are met:
>
> > (1) The employee has successfully completed a Presidential Management Internship at the time of conversion:
> >
> > (2) The employee is recommended for conversion at least 90 calendar days before the completion of the internship. The agency decides whether or not to convert the employee. No recommendation is made to the OPM. Agencies are asked to inform the PMIP, U.S. Office of Personnel Management, when an individual will not be converted.

The language of Chapter 362-7 clearly suggests that the Agency decides whether or not to convert an employee. If the Agency does convert the employee, OPM regulations do not require that a recommendation be made to the OPM

Judge Mohan testified that Soehngen's tenure as a Program Analyst was insufficient to warrant conversion. She stated:

> It as insufficient for all the various aspects of the analytical abilities that were required of the future of a permanent program analyst in this staffing position.

> The time for orientation to the program, the time for the increasing responsibilities, the time for the assessment of the individual's abilities to perform in the duties and the changing nature of the program itself and changing of the department's focus, the Anti-Drug abuse act of limitation that I talked about, the impact of several legal changes, which, at that point, I could foresee impacting the case load management needs of our system.
>
> That, as combined consideration, led me to believe that Mr. Soehngen's ability to perform in this position required additional time in the position before any conversion favorable to him could be made.

Although Judge Mohan testified that she believed Soehngen needed more time as a Program Analyst before conversion to a permanent position, the weight of the evidence does not support such a conclusion. Most importantly, Judge Mohan rated Soehngen fully successful for the period from September 1, 1988 until March 31, 1989, a period of eight months. With respect to all four critical elements that formed a part of Soehngen's duties during this period, Judge Mohan rated him fully successful in all four elements. In the one element which was rated noncritical, Judge Mohan rated Soehngen as excellent. Judge Mohan's narrative comments regarding the four critical element hardly justifies her testimony that his analytical abilities were insufficient to meet the needs of his position.[2]

In addition, Soehngen has no performance standards in place from March 31, 1989 to May 23, 1989, the date the Agency requested his extension. Judge Mohan further testified that no performance work plan has been in effect since March 31, 1989.

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[2] Chief Judge Robie approved the performance appraisal as the reviewing official. His law school recommendation letter on behalf of Soehngen was praiseworthy and indicated no deficiencies with his performance.

Soehngen's position description was never modified during his tenure with the Criminal Alien Unit. His duties were never modified in any way. Soehngen was never informed of any change in the priorities of the Criminal Alien Unit during his tenure. Soehngen's critical elements never changed during this tenure in the Criminal Alien Unit.

Judge Mohan testified that she had some problems with a document that Soehngen submitted after his attendance at an American Bar Association sponsored pro bono conference in Miami in April 1989. Judge Mohan claimed that this memorandum did not tell her anything of substance regarding the discussion at the conference. Yet, on April 25, 1989, when she signed Soehngen's evaluation she had knowledge of this document. Yet, Judge Mohan rated Soehngen excellent in his performance appraisal rating in the pro bono area.

Judge Mohan testified as to deficiencies in a memorandum Soehngen prepared in February 1989. She claimed that percentages calculated by Soehngen were incorrect. In describing some of Soehngen's deficiencies in February and March 1989, Judge Mohan testified as follows:

> It is hard for me to recognize exactly when some of these deficiencies became very clear to me. There were things that were happening during the February analysis of calendars that at first I attributed to either a lack of direction on my part, a lack of clarity on my part, a lack of understanding on Mr. Soehngen's part, a lack of time for us to have specific attention to some of these things, but the pattern became a fairly significant one, a fairly repetitive one by some time in March.

In summary, it is difficult to be persuaded by Judge Mohan's testimony regarding Soehngen's deficiencies. The performance appraisal that Judge Mohan gave Soehngen included the period of February and March 1989. Therefore, I must take at face value the fully successful rating that she gave him for this period. Her argument that Soehngen was having difficulties, which

led her to the conclusion that he should not converted to a permanent employee, is unpersuasive. I find that at the time the Agency requested approval from OPM to extend Soehngen's internship, he was performing at a fully satisfactory level, which should have caused Agency officials no concern in converting him to a permanent career civil service employee.

Although the Agency did not submit the justification of further training needs for Soehngen when the extension request was submitted in May 1989, they did submit the plan in July or August 1989. Although the provisions of FPM Chapter 362-6 provide that the written request for extension should be submitted no later than 60 days prior to the end of the two year period, the provision is precatory and not mandatory. In my view, the failure of the Agency to submit this justification 60 days prior to the end of the two year period does not constitute harmful error to Soehngen.

However, a review of the justification of further training submitted by the Agency does not justify its position that an extension was in order. In its justification, the Agency contended that Soehngen's change of agencies during his internship resulted in a major modification in career direction. When the justification was submitted, Soehngen had served in the Program Analyst, GS-301-11 position for almost one year. Soehngen testified that no Agency official discussed with him any sort of modification in career development. According to the testimony of Soehngen, he received a positive and favorable mid-year review, which was confirmed by his receipt of the fully successful rating in May 1989.

The Agency mentioned that Soehngen's academic credentials did not prepare him for his current position. The Agency contended in its justification that Soehngen's internship training prior to May 1989 was not sufficient to eliminate the voids in this knowledge, skills and abilities. In analyzing those reasons, it is apparent that the Agency's concerns were not justified. These issues were never discussed with Soehngen prior to August 1989. I would assume that if Agency officials had these concerns, they would have discussed these matters with him. While there might not have been a formal requirement to discuss these matters with him, the failure of Agency officials to do so forms another basis to

disregard the justification. As stated earlier, Judge Mohan's rating of fully successful in May 1989 cannot be overlooked as the significant determining factor the Soehngen was performing all duties required of him.

The Agency alleged the although training opportunities were available to Soehngen, additional training was necessary. However, Soehngen attended all training classes which Judge Mohan requested he attend. Soehngen testified that he attended the National ASPA conference and the Criminal Alien Unit Conference. Soehngen stated he suggested training programs to Judge Mohan, which she approved. Soehngen did not refuse to attend any training that Judge Mohan suggested he attend.

In its justification, the Agency claimed the Soehngen was registered to take a Management Practices Course sponsored by the Agency and a Managerial Negotiating Skills Course sponsored by OPM. The Agency maintained that the Management Practices Course was canceled by the Agency and Soehngen's medical condition prevented him from participating in the OPM course. Soehngen claimed that these two training courses were initiated by him. He testified that he attended the Management Practices Course sponsored by the Agency, but the Managerial Negotiating Skills course had not been offered. Soehngen further explained that he has attended four additional training courses.

It is implausible that training deficiencies prevented Soehngen from successfully completing his PMI program. It is undisputed that Soehngen attended all training courses that he was asked to attend. It is undisputed that Soehngen suggested training courses to Judge Mohan, which he subsequently attended. In essence, Soehngen did whatever he was requested to do regarding the Agency's training needs. Part of the Agency's position was that is canceled training which Soehngen had been scheduled to attend. Obviously, Soehngen was not at fault when the Agency canceled a training program he was scheduled to attend.

In summary, I find that the Agency's argument that Soehngen was in need of additional training is not supported by the evidence. I am persuaded that Soehngen met all of the training requirements that he could possibly meet under the circumstances.

For the Agency to claim that Soehngen's failure to attend the Management Practices Course, which the Agency canceled, prevented him from meeting the training requirement is untenable.

In reviewing the totality of the Agency's justification for Soehngen's PMI extension, I am unpersuaded that it meets the requirements and intent of FPM Chapter 362. FPM Chapter 362-6 states that an extension will be the exception rather than the rule. Soehngen was a fully successful employee, according to the performance appraisal written by his immediate supervisor. Judge Mohan's testimony, which appears to contradict Soehngen's performance rating, does not support a decision to approve the Agency's request to extend his PMI program.

The Agency cannot rely upon the failure of a background investigation to be completed, when the Agency unilaterally requested that the background investigation be discontinued. Even if the background investigation is a requirement for successful completion of the internship,[3] which is dubious at best, the Agency cannot come into this proceeding with unclean hands and support its position.

I find that the Agency violated FPM Chapter 362 by extending Soehngen's PMI for a third year.

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[3] I am not persuaded that FPM Chapter 372 covers the situation in Soehngen's case. Agency officials testified that they know of no regulation that required completion of a background investigation before successful completion of the internship. OPM's Manager also knew of no regulation or requirement to preclude conversion of a PMI employee absent completion of a background investigation.

ALLEGED REPRISAL FOR SOEHNGEN HAVING FILED A GRIEVANCE

Soehngen alleged that his claim of reprisal constitutes a prohibited personnel practice under 5 U.S. C. §2302(b)(9). Soehngen claimed that the PMI extension was the result of his filing a grievance over his performance appraisal on May 12, 1989. Soehngen maintained that he met the four criteria enumerated in Gerlach v. Federal Trade Commission, 8 M.S. P. B 599 (1981). The four criteria set forth in Gerlach, 8 M.S.P.B. at 600-601 indicate that an employee must demonstrate the following to prevail on a reprisal claim:

(1) he engaged in activity protected by 5 U.S.C. §2302(b)(9);

(2) he was treated iwan adverse fashion by the employer;

(3) the deciding officials had actual or constructive knowledge that the employee was engaged in protective activity;

(4) there ia a causal connection between the protected activity and the adverse action and the protected activity was a significant factor in the taking of the adverse action.

While the Agency admits the Soehngen satisfied at least one of the requirements set forth above, they take exception to the allegation that the fourth criteria was met by Soehngen. The Agency contended that under the facts and circumstances surrounding the filing of the grievance and the pursuit of the extension request, there was not any "causal connection" between the grievance and the extension.

Soehngen contended that the request for extension May 23, 1989 was made in response to the filing of the grievance on May

12, 1989. Before a finding of "causal connection" can be made, all of the dates surrounding the request for extension and the filing of the grievance need to be examined.

Although the extension request was not submitted until May 23, 1989, the Agency presented undisputed testimony of meetings that occurred prior to that date concerning the extension request. On April 28, 1980, Judge Mohan had a telephone conversation with Matus about the possibility of an extension request for Soehngen. Matus testified that after her telephone conversation with Judge Mohan, she discussed with Annandale in the Agency's Personnel Office, what information must be contained in an internship extension request. Matus' notes reflect that on May 1 and May 8, she discussed with Annandale about the specifics of such an extension request. On May 10, 1989, Matus and her supervisor, Carroll, met with Judge Mohan to discuss the contents of the letter that the Agency would be sending to OPM for Soehngen's PMI extension request.

All of these meetings described in the preceding paragraph show that the Agency's efforts to request a PMI extension for Soehngen occurred prior to the filing of the grievance on May 12, 1989. The preliminary meetings occurred even prior to Soehngen receiving the performance appraisal, upon which the grievance was filed.

Upon reviewing the dates of the management meetings and the filing of Soehngen's grievance, there can be no doubt the Agency officials commenced discussions on the PMI extension request prior to the filing or the grievance. The unrefuted testimony of Matus and Mohan show conclusively that the Agency decided on the extension request prior to May 12, 198. Therefore, given the timing of these events, there is no possibility that any "causal connection" existed between the filing of the grievance and management meetings to consider and request Soehngen's extension request.

Soehngen's allegation that the Agency acted in reprisal for his filing of a grievance is denied. The Agency decision to extend Soehngen's internship was not based upon an unlawful reprisal.

REMEDY

Having found that management violated the provisions of FPM Chapter 362 by extending Soehngen's PMI appointment, the Grievant is entitled to some remedy. In its post-hearing brief, the Grievant requested the following relief:

(1) a retroactive appointment to August 24, 1989;

(2) A retroactive appointment to a GS-12 position commencing on his conversion to a permanent career civil service position;

(3) an award of back pay consisting of the difference between what he is currently being paid in his GS-11 position and what he would have received on proper conversion;

(4) a grant of attorneys fees based upon the Back Pay Act, 5 U.S.C. §5596.

I have considered the requested remedies suggested by Soehngen. Having found that the Agency violated FPM Chapter 3 , I find that Soehngen is entitled to retroactive appointment to August 24, 1989. Soehngen should be converted to a permanent career Civil Service position based upon his successful completion of the PMI program.

I find that the other three remedies suggested by Soehngen are not appropriate. Chief Judge Robie testified that conversion from the PMI program to a career civil service position does not entitle the employee to automatic promotion. He further testified that the Agency has not promoted everyone immediately who has successfully completed the PMI internship. This testimony was unrefuted. Therefore, I find that it is within the Agency's discretion to determine when and if Soehngen should be promoted to the GS-12 level.

Having found that promotion to the GS-12 level is within the discretion of the Agency, Soehngen is not entitled to any back pay under the Back Pay Act, 5 U.S.C. §5596. Therefore, no attorney fees can be warranted.

FINDINGS AND RECOMMENDATIONS

After considering all of the evidence presented, including the arguments raised in the post-hearing brief, I find that:

1. The Agency violated FPM Chapter 362 by extending Richard Soehngen's Presidential Management Internship for a third year;

2. The Presidential Management Internship extension was not an unlawful reprisal for Richard Soehngen having filed a grievance on May 12, 1989.

I recommend that:

1. Richard Soehngen be retroactively converted to a career civil service position at the GS-11 level as of August 24, 1989;

2. Richard Soehngen is not entitled to any retroactive appointment to the GS-12 level.

3. Richard Soehngen is not entitled to an award of back pay;

4. The request for attorneys fees under the Back Pay Act, 5 U.S.C. §5596 be denied.

Roger P. Kaplan
Fact-Finder

APPENDIX H

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD C. SOEHNGEN, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER DC07529010604 DATE: OCT. 16 1990

Steven L. Murray, Esquire, Neill, Mullenholz & Shaw, Washington, D.C., for the appellant.

Mary E. Magee, Esquire, Washington, D.C., for the agency.

BEFORE

Elizabeth B. Bogel
Administrative Judge

INITIAL DECISION

The appellant filed an appeal alleging that the August 24, 1990, expiration of his appointment as a Presidential Management Intern, GS-11, Executive Officer for Immigration Review, Office of the Chief Immigration Judge, was retaliation against him for

engaging in whistleblowing activities in violation of 5 U.S.C. §2302(b)(8). For the following reasons, the appeal is DISMISSED.

Under 5 U.S.C. §7701(c), an individual may appeal to the Board from any action which is made appealable to the Board under any law, rule or regulation. The Board has no plenary jurisdiction; rather, its jurisdiction is limited to those areas specifically granted by statute regulation. *Cowan v. United States*, 710 F.2d 803, 805 (Fed.Cir. 1983). No such grant of jurisdiction exists for a separation which is the result of the expiration of a time limited appointment.

The appellant argued that the expiration of his appointment was a termination and that, as preference eligible employee, he was entitled to the procedural protections of 5 U.S.C. Chapter 75. Since the "termination" was effected without any such procedures, he argued, the agency has committed reversible procedural error.

The appellant argued, without contradiction, that he entered the Presidential Management Internship (PMI) program on August 24, 1987, as a Program Analyst for the Department of the Army, and transferred within the program on January 11, 1988, to the Executive Office for Immigration Review. At the completion of a two-year internship, an agency must take action to convert, extend or terminate interns. Federal Personnel Manual (FPM), Chapter 352, at 2-7a. At the end of the appellant's two-year internship, the Executive Office for Immigration Review chose to extend his internship for a third year. See Appellant's request, Attachments 7-9.

At the end of the third year, the appellant's appointment expired. Upon the expiration of the appellant's appointment, the conditions for termination specified in FPM Chapter 362, at 2-8 applied. See Appellant's request, Attachment 8. That paragraph provides in pertinent part:

. . . the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from [Office of Personnel Management]. If neither of those actions is taken, the PMI appointment terminates.

The same paragraph stated that removal actions for unacceptable performance or for misconduct against preference eligibles must be taken under 5 U.S.C. Chapters 43 and 75, respectively. The appellant argued that he has been removed, and, thus, the agency was required to use Chapter 75 procedures.

There is no basis for interpreting FPM Chapter 362, paragraph 2-8 as requiring the use of Chapter 75 procedures at the expiration of a PMI appointment. The plain language of the paragraph states that if no action is taken by the agency upon the expiration of an appointment, the appointment terminates. Clearly, the agency is required by the terms of that paragraph to use the procedures in Chapters 43 and 75 only in the event it must remove an intern prior to the expiration of the appointment for unacceptable performance or misconduct.

The Board has consistently held that, when an expiration date of an appointment is specified as a basic condition of employment, the expiration of the appointment is not an adverse action appealable to the Board. Moreover, an agency's consideration of an appellant's performance or conduct in deciding not to reappoint him does not invoke the Board's jurisdiction. *See Meade v. Federal Deposit Insurance Corporation*, 41 M.S.P.R. 191, 193 (1989); *Shelton v. Federal Deposit Insurance Corporation*, 38 M.S.P.R. 303, 306 (1988); *Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199, (1980). In this case, it is clear that the appellant originally accepted a two-year PMI appointment and that, with notice to the appellant, the agency extended the appointment by one more year. Accordingly, I find that the time limitation was a basic condition of the appointment, and the appellant was at all times aware of it.

The appellant argued that agency assurances to him about the probability of conversion to a competitive appointment gave him "a clear expectation of continued employment." This expectation was bolstered, he argued, by the provisions of FPM Chapter 362 which permit conversion as long as the employee has performed satisfactorily with the agency. FPM Chapter 362 provides that an employee is eligible for conversion to a career or career-conditional appointment if:

> (1) The employee has successfully completed a Presidential Management Internship at the time of conversion; and (2) the employee is recommended for conversion at least 90 calendar days before the completion of the internship. The agency decides whether or not to convert the employee.

FPM Chapter 362 at 2-7b. Clearly, the agency retains the discretion to decide whether to convert an employee even where the employee is performing satisfactorily. I find no evidence that the appellant has a "clear expectation of continued employment." Even if I had found that the appellant had such an expectation, procedural protections provided by statute do not attach on the basis of an employee's expectation no matter how reasonable it might be. *Of. White v. Department of the Air Force*, 32 M.S.P.R. 590, 593-94 (1987) *aff'd* 835 F.2d 871 (Fed.Cir. 1987)(Table).

The appellant has not met his burden of proving that the expiration of his PMI appointment was an action over which the Board has jurisdiction. Because the appellant's separation was not an otherwise appealable action, the Board does not have jurisdiction to consider his claim that the agency retaliated against him because of whistleblowing activities. *See Wein v. Department of the Navy*, 37 M.S.P.R. 379, 381 (1988).

The Board would have jurisdiction over the appellant's whistleblower claim in an individual right of action appeal, however, before bringing such an appeal to the Board the appellant must first seek corrective action from the Special Counsel. See 5 U.S.C. §1221(a); 5 C.P.R. §1209.2(b)(1).[1] Since there is no evidence that the appellant has sought corrective action from the

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[1] On July 12, 1990, the Board published its final regulations implementing the Whistleblower Protection Act in the Federal Register. Citations in this order will be to the Board's regulations at 5 C.F.R. Part 1209; however, parties should refer to 55 Fed. Reg. 28,591 - 28,593 (1990) for the text of all references to this part.

Special Counsel, the Board does not have jurisdiction to entertain his claim as an individual right of action appeal.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Elizabeth B. Bogle
Administrative Judge

NOTICE TO APPELLANT

The initial decision will become final November 20, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that your have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX I

Fact-Finder's Report on Grievance
January 23, 1991

To: William P. Barr
Deputy Attorney General

FROM: Harry F. Flickinger
Assistant Attorney General for Administration

Attached for your review is a copy of the Fact Finder's report and recommendations pertaining to the grievance submitted by Richard C. Soehngen under the provisions contained in Deparment's administrative grievance procedure contained in Department of Justic (DOJ) Order 1771.1B. Until the expiration of his appointment as a Presidential Management Intern (PMI) on August 24, 1990, Mr. Soehngen was employed by the Executive Office for Immigration Review (EOIR) as Program Analyst, GS-301-11.

On September 20, 1989, Mr. Soehngen filed a grievance with EOIR Director David L. Milhollan concerning a 1-year extension of his appointment as a PMI. Since Mr. Milhollan did not grant the relief sought by Mr. Soehngen, in accordance with DOJ Order 1771.1B you were designated as the deciding official in this grievance. Additionally, since the facts of the grievance were in dispute, a Fact Finder was appointed on your behalf. The essential facts of the case follow.

The PMI program is designed to attract to the Federal service superior men and women from a variety of academic disciplines. A PMI is given a 2-year temporary appointment in the excepted service. Upon satisfactory completion of the intership, the PMI is eligible for conversion to a permanent career or career-conditional appointment within the same agency. The U.S. Office of Personnel Management (OPM) issues Government wide regulations for the PMI program in Federal Personnel Manual (FPM) Chapter 362. Those regulations provide, among other things, for the extension of an internship for up to one year in

situations which require additional time for the training and development of an intern.

Mr. Soehngen became a PMI on August 24, 1987, as a Program Analyst with the Department of the Army in Falls Church, Virginia. On January 11, 1988, Mr. Soehngen transferred from the Department of the Army to EOIR to assume the position of Management Officer in El Paso, Texas. Mr. Soehngen was resassigned to the position of Program Analyst at EOIR's Falls Church, Virginia headquarters in August 1988. From his reassignment to the expiration of his appointment, Mr. Soehngen worked under the supervision of Assistant Chief Immigration Judge Mary Ann Mohan.

On May 3, 1989, Mr. Soehngen recieved a fully successful performance rating from Ms. Mohan for the rating period September 1, 1988 through March 31, 1989. On May 12, 1989, Mr. Soehngen filed a request for review of his rating (later determined to be a performance rating grievance) with the reviewing officials, EOIR Chief Immigration Judge William Robie.

In late April 1989, EOIR determined that it would be necessary to request a 1-year extension of Mr. Soehngen's intership because he had not served in the position of Program Analyst for a sufficient amount of time to recommend his conversion to the competitive service. OPM's regulatory guidance requires that requests for extensions of internships be submitted no later than 60 days prior to the end of the intial 2-year period. A written request to extend the intership from August 24, 1989 to August 24, 1990 was therefore submitted to OPM by the Department's Personnel Staff on May 23, 1989. OPM approved the request on May 26, 1989.[1]

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[1] When the extended appointment expired on Augst 24, 1990, Mr. Soehngen was not converted to a career or career-conditional appointment. As a result, Mr. Soehngen is no longer an employee of the Department. Allowing a temporary appointment to expire at the end of its term is not an adverse action directly appealable to the Merit Systems Protection Board (MSPB). Therefore, when

As noted above, Mr. Soehngen filed this grievance over the 1-year extension of his intership on September 20, 1989. The parties stipulated that the tow issues were (1) whehter the extension was contrary to regulation and (2) whether it was in retaliation for his having filed the earlier grievance over his performance rating. The Fact Finder assigned to the grievance, Roger P. Kaplan, concluded that the Department violated FPM Chapter 362 by extending Mr. Soehgnen's intership for one year. Mr. Kaplan found, however, that no prohibited personnel practice has occurred -- that the extension was not in retaliation for Mr. Soehngen's having filed a performance rating grievance. As a remedy, the Fact-Finder recommended that the 1-year extension be voided and that Mr. Soehngen's having filed a performance rating grievance. As a remedy, the Fact Finder recommended that a 1-year extension be voided and that Mr. Soehngen be converted retroactively to a career appointment effective August 24, 1989, and that he be awarded attorney's fees. For the reasons which follow, we do not belive the Fact Finder's recommendations should be accepted.

First, the Department does not have the authority to approve PMI extensions; that authority rests solely with OPM. It is not possible therefore, for the Department to have violated FPM Chapter 362 by extending Mr. Soehngen's intership. OPM established the guidelines for the administration of the PMI program and specifically approved the Department's request for an extension of Mr. Soehngen's intership. There is not indication in the Fact Finder's report that the Department in any way misled OPM in requesting the extension. In effect, Mr. Kaplan has second-guessed OPM's determination that an extension was warranted,

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Mr. Soehngen challenged the decision not to convert his appointment, he did so by filing a prohibited personnel practice complaint with the MSPB's Special Counsel, alleging that the decision was in retaliation for whistle-blowing. This complaint, which is distinct from the grievance over the extension of the internship, is still pending decision, although Mr. Soehngen's initial request for a stay was not granted.

substituting his own judgment for that of the agency charged with governtment-wide administration of the program. In view of the fact that OPM developed and oversees the PMI program, we think there is a real question whether a Fact Finder engaged by the Department is within the scope of his authority in finding that an action by OPM is inappropriate.

Furthermore, we believe that once Mr. Kaplan determined that the request for an extension was not illegally motivated, he should have recommended that the grievance be denied. As long as such a management decision is not illegally motivated, is should not be subject to third-party review. Instead, such a determination should be left to management's discretion. Therefore, management need not show that the decision to request the extension was necessary or even wise, as long as the grievant cannot show that it was illegally motivated. Lastly, we believe that even though the Department was not required to do so, the Department did show that extension was necessary. The record indicates, in our opinion, that Mr Kaplan erred in determining that the Department had no basis for requesting the extension.

Finally, we think is significant that Mr. Soehngen's appointment could been allowed to lapse after two years rather than being extended for an additional year. In effect, rather than terminating his appointment at that point, he was given the benefit of a second chance. Had the appointment been allowed to lapse after the intial 2-year appointment, Mr. Soehngen would not have been allowed to grieve that action under the administrative grievance procedure. Rather, his only recourse would have been to file a prohibited personnel practice complaint with the Special Counsel, just as he is doing now that the extended appointment was allowed to expire. EOIR should not be penalized for extending the appointment rather than terminating it by having the Fact Finder's recommendation serve as a back door through which Mr. Soehngen could get the relief which he must try to obtain from the Special Counsel.

While, according to DOJ Order 1771.1B, Fact Finder's recommendations are normally accepted, we believe there are compelling reasons here not to follow that course. The

Department's grievance procedure provides that if the deciding official determines that a Fact Finder's recommendation should be rejected, he seek the concurrence of a higher level official. Therefore, if you agree with this recommendation, the concurrence of the Attorney General must be obtained. I have attached a memorandum which you may use for this purpose.

Attachment

U.S. Department of Justice
Office of the Deputy General

The Deputy Attorney General — Washington, D.C.

MEMORANDUM — February 2, 1991

TO: Dick Thornburgh
Attorney General

FROM: William P. Barr s>
Deputy Attorney General

SUBJECT: Fact-Finder's Report on Grievance

I was designated as the deciding official with respect to a grievance filed by Richard C. Soehngen of the Executive Office for Immigration Review. Mr. Soehngen grieved the extension of his appointment as a Presidential Management Intern for an additional year instead of being converted to a permanent position in the competitive service. The Fact Finder designated to submit a report and recommendation has recommended that the grievance be granted, and that Mr. Soehngen be retroactively converted to a permanent position.

For the reasons included in the attached memorandum, I have concluded that the Fact Finder's recommendation should not be accepted. Under the terms of the Department's administrative grievance procedure, DOJ Order 1771.1B, a higher level official must concur with a deciding official's determination not to accept a Fact Finder's recommendation. Accordingly, I request that you concur in my determination.

(4)

91-1264

No._____

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner,

v.

Merit System Protection Board,

Respondent.

APPENDICES

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Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153
(703) 720-0315

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APPENDIX J.

5 USCS § 7511 (a)(1)(B)

"employee means--
... a preference eligible in an Executive agency in the excepted service, and a preference eligible In the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;"

APPENDIX K.

5 USCS § 4303(e)

"... any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title [5 USCS § 7701]"

5 USCS § 7513. Cause and procedure

(a) Under regulations prescribed by Office of Personnel Management, an agency may take an action covered by this subchapter [5 USCS §§ 7511 et seq.] against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to— (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action ...

II. DETERMINATION TO TAKE ADVERSE ACTION

A. General Considerations

10. **Generally**

Congress has forbidden agency to take adverse actions against preference eligible employees except for cause which will promote efficiency of service, and in such action it has provided employee with right to notice and hearing.

APPENDIX L.

38 U.S.C.S.

§ 2011. **Definitions**

As used in this chapter [38 USCS §§ et seq.]—

(1) The term "special disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Veterans' Administration for a disability rated at 30 percent or more, or (B) a person who was discharged or released from active duty because of a service-connected disability.

(3) The term "disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Veterans' Administration or (B) a person who was discharged or released from active duty because of a service-connected disability.

(4) The term "eligible veteran" means a person who (A) served on active duty for a period of time of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge, or (B) was discharged or released from active duty because of a service-connected disability.

(5) The term "department or agency" means any agency of the Federal Government or District of Columbia, including any Executive agency as defined in section 105 of title 5 [5 USCS].

§ 2014. **Employment within the Federal Government**

(a) It is the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified disabled veterans and veterans of the Vietnam era.

(b)(1) To further the policy stated in subsection (a) of this section, veterans of the Vietnam era shall be eligible, in accordance with regulations which the Office of Personnel Management shall prescribe, for veterans readjustment appointments, and for subsequent career-conditional appointments...

(c) Each department, agency, and instrumentality in the executive branch shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such department, agency or instrumentality as required by section 501(b) of the Rehabilitation Act of 1973 (29) U.S.C. 791(b) [29 USCS § 791(b)], a separate specification of plans (in accordance with regulations which the Office of Personnel Management shall prescribe in consultation with the Administrator, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, consistent with the purposes, provisions, and priorities of such Act) to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of this section.

(d) The Office of Personnel Management shall be responsible for the review and evaluation of the implementation of this section and the activities of each such department, agency, and instrumentality to carry out the purpose and provisions of this section. The Office shall periodically obtain and publish (on at least a semiannual basis) reports on such implementation and activities from each such department, agency, and instrumentality, including specification of the use and extent of appointments made under subsection (b) of this section and the results of the plans required under subsection (c) of this section. Each report under the preceding sentence shall include in the specification of the use and extent of appointments made under subsection (b) of this section the following information (shown for all veterans and separately for veterans described in subsection (b)(1)(C) of this section and other veterans):

(1) The number of appointments made under such subsection since the last such report and the grade levels in which such appointments were made.

(2) The number of individuals receiving appointments under such subsection whose appointments were converted to career conditional appointments, or whose employment under such an appointment has terminated, since the last such report, together with a complete listing of categories of causes of appointment terminations and the number of such individuals whose employment has terminated falling into each such category.

(3) The number of such terminations since the last such report that were initiated by the department, agency, or instrumentality involved and the number of such terminations since the last such report that were initiated by the individual involved.

(4) A description of the education and training programs in which individuals appointed under such subsection are participating at the time of such report.

(e) The Office of Personnel Management shall submit to the Congress annually a report on activities carried out under this section, except that, with respect to subsection (c) of this section, the Office may include a report of such activities separately in the report required to be submitted by section 501(d) of the Rehabilitation Act of 1973 (29 U.S.C. 791(d) [29 USCS § 791(d), regarding the employment of handicapped individuals by each department, agency, and instrumentality.

(f) Notwithstanding section 2011 of this title [38 USCS § 2011], the terms "veteran" and "disabled" as used in subsection (a) of this section shall have the meaning provided for under generally applicable civil service law and regulations.

APPENDIX M.

Section 2-8 of Chapter 362 Federal Personnel Manual

"The Schedule A appointment of a Presidential Management Intern expires at the end of the 2-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies' policies and procedures regarding budget constraints, staffing patterns and/or reduction in force. **For preference eligibles as defined in 5 U.S.C. § 7511 (a)(1)(B), removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C.§ 4303(e) or those relating to adverse actions provided at 5 U.S.C. § 7513. An agency may not remove an intern based upon a prohibited personnel practice listed in 5 U.S.C.**

Termination actions should be consistent with the objectives of the program to select, develop and retain for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to Presidential Management Intern Program Office of the decision to terminate."

APPENDIX N.

The purpose of a performance work plan is clearly established in 5 U.S.C. § 4302. Performance-rating plans; establishment of:

> **"For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal service, each agency shall establish and use one or more performance-rating plans for evaluating the work performance of its employees."**

APPENDIX O.

This appendix should contain a Performance Work Plan (PWP) for April 1, 1989 to March 31, 1990; however it was never provided.

APPENDIX P.

This appendix should contain a Performance Work Plan (PWP) for December 31, 1989 to March 31, 1990; however it was never provided.

APPENDIX Q

U.S. Department of Justice
Executive Office of Immigration Review
Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike
Suite 2545
Falls Church, VA 22041

February 7, 1990

MEMORANDUM FOR: Richard C. Soehngen
PMI/Program Analyst

THROUGH: Mary Ann Mohan
Assistant Chief Immigration Judge

FROM: William R. Robi >s
Chief Immmigration Judge

SUBJECT: Approval of Proposed Training Courses

The following proposed 1990 training courses are approved for your attendance:

1. Executive Briefing Seminar, OPM/PMIP, Date to be set
3. Management Practice Course DOJ, 2/26 - 3/7
5. The Management Seminar, OPM/WASC, 3/25-3/30
7. Intro to Program Evaluation, OPM/WASC, 3/13-3/17
8. Presenting Statistics Using Graphs/Charts/Tables, OPM/WASC, 6/6-6/8
10. Project Mgmt: Planning/Scheduling/Control Techniques, OPM/WASC
11. Crime in Commerce III: Information Systems: GWU, 5/15-6/20

15. Statistics in Management, OPM/WASC, 4/9-4/13

Additionally, you should plan to attend a DOJ course entitled "Team Building and Productivity" which will be held March 19-20, 1990.

Judge Mohan has advised me that you and she are developing a training course review process to evaluate specific knowledge, skill and abilities development as related to the work of the Criminal Alien Unit, which is the primary focus of this training plan. I am pleased to hear that, and look forward to reviewing the joint proposal that will be made as part of your Performance Work Plan (PWP) for the corresponding rating period.

Thank you for your attention to these matters.

Exhibit - 2a -

APPENDIX R.

This appendix should contain a Finalized Individual Development Plan (IDP); however it was not finalized with Petitioner's supervisor.

APPENDIX S

Undisputed non-existent performance rating April 1, 1989 to March 31, 1990 and undisputed non-existent performance work plane April 1, 1990 to March 31, 1991 (Third possible PWP after incidents occurred).

APPENDIX T

Department of Justice Performance Appraisal Record

Disclosure Statement

This information is personal. It must be appropriately safeguarded from improper disclosure and it should only be made available for review by appropriate management levels having a need to know.

Name of Employee: Richard C. Soehngen

Position Title. Pay Plan. Series. Grade: PMI Program Analyst, 8031, GS-11

Component: EOIR/OCIJ

Rating Period (from/to): June 20, 1990 to March 31, 1991

ACKNOWLEGEMENT OF DEVELOPMENT, DISCUSSION AND APPROVAL OF PERFORMANCE WORK PLAN

Employee Sig.: Richard C. Soehngen s>	Rating Official Sig.: Mary Ann Mohan s>	Reviewing Officials Sig.
Date: 6/20/90	Date: 6/20/90	Date:

Exhibit -1-

PART V
EMPLOYEE APPRAISAL RECORD

EMPLOYEE NAME: Richard C. Soehngen Page No. 15 of 16
COMPONENT: EOIR/OCIJ
S.S.N.: 101-40-6790 RATING PER.: 6/20/90 to 3/31/91
x Non-attorney status

ELEMENT NO.	CRITICAL/NON CRITICAL WEIGHTING	JOB ELEMENT TITLE (BRIEF/CONCISE)
1	C	Performs special analytical studies
2	C	Establishes and maintains program contacts for CAP coordination purposes
3	C	Assists in development and review of systems to collect, verify and analyze caseload information.
4	C	Serves as CAP Liaison with EOIR personnel
5	NC	Assists in establishing and maintaining pro bono contacts and rosters for CAP purposes.

PARTS I-IV
PERFORMANCE WORK PLAN, PROGRESS REVIEW RECORD, PERFORMANCE ACHIEVEMENTS AND INDIVIDUAL ELEMENT RATING

EMPLOYEE NAME: Richard C. Soehngen Page 1 of 16

ORGANIZATION: Executive Office for Immigration Review
Rating Period: June 29, 1990 to March 1991

PART 1-PWP (continued)

A. JOB ELEMENT NUMBER AND TITLE (CRITICAL /NONCRITICAL / WEIGHTING, IF APPROPRIATE):
Job element no. 1:

x Critical — Performs special studies involving analytical assignments with focus on logistical and management integration. Identifies, researches and analyzes various policy and procedural issues.

❑ Noncritical — Develops written analysis and position papers for problem resolution and policy guidance implementation.

B. PERFORMANCE STANDARD(S):

OUTSTANDING — To within 90 to 100 percent accuracy, completeness, and timeliness, assists the Assistant Chief Immigration Judge in conduction special studies involving assignments with logistical and management integration. To within 90 to 100 percent accuracy, completeness, and timeliness, identifies, researches and analyzes various policy and procedural issues. To within 90 to 100 percent

accuracy, completeness, and timeliness, assists in developing written analyses and position papers to identify and resolve problem areas in the implementation of policy and/or programmatic operations.

EXCELLENT: To within 80 to 89 percent accuracy, completeness and timeliness, assists the Assistant Chief Immigration Judge in conduction special studies involving assignments with logistical and management integration. To within 80 to 89 percent accuracy, completeness and timeliness, identifies, researches and analyzes various policy and procedural issues. To within 80 to 89 percent accuracy, completeness, and timeliness, assists in developing written analyses and position papers to identify and resolve problem areas in the implementation of policy and/or programmatic operations.

FULLY SUCCESSFUL To within 70 to 79 percent accuracy, completeness, and timeliness, assists the Assistant Chief Immigration Judge in conduction special studies involving assignments with logistical and management integration. To within 70 to 79 percent accuracy, completeness, and timeliness, identifies, researches and analyzes various policy and procedural issues. To within 70 to 79 percent accuracy, completeness, and timeliness, assists in developing written analyses and position papers to identify and resolve

	problem areas in the implementation of policy and/or programmatic operation.
MINIMALLY SUCCESSFUL	To within 60 to 69 percent accuracy, completeness, and timeliness, assists the Assistant Chief Immigration Judge in conducting special studies involving assignments with logistical and management integration. To within 60 to 69 percent accuracy, completeness, and timeliness, identifies, researches, and analyzes various policy and procedural issues. To within 60 to 69 percent accuracy, completeness, and timeliness, identify and resolve problem areas in the implementation of policy and/or programmatic operation.
UNACCEPTABLE	With less than 60 percent accuracy, completeness, and timeliness, assists the ACIJ in conduction special studies involving assignments with logistical and management integration. With less than 60 percent accuracy, completeness, and timeliness, assists in developing written analyses and position papers to identify and resolve problem areas in the implementation of policy and/or programmatic operations.

EMPLOYEE NAME: Richard C. Soehngen Page 4 of 16

ORGANIZATION: Executive Office for Immigration Review
Rating Period: June 29, 1990 to March 1991

PART 1-PWP (continued

A. JOB ELEMENT NUMBER AND TITLE (CRITICAL /NONCRITICAL / WEIGHTING, IF APPROPRIATE):
Job element no. 2:

x Critical — Assists in establishing and maintaining program contact with outside agencies, individuals, and organizations to effectively coordinate and review criminal alien hearing programs and caseload

❑ Noncritical — operations.

B. PERFORMANCE STANDARD(S):

OUTSTANDING — To within 90 to 100 percent accuracy, completeness, and timeliness, assists the Assistant Chief Immigration Judge in establishing contact with outside agencies, individuals and organizations to effectively coordinate operations. To within 90 to 100 percent accuracy, completeness, and timeliness, insures the Assistant Chief Immigration Judge is aware of concerns addressed by outside agencies, individual and organizations.

EXCELLENT: — To within 80 to 89 percent accuracy, completeness and timeliness, assists the Assistant Chief Immigration Judge in the establishment and maintenance of contacts with outside agencies, individuals and organizations to effectively coordinate and

review criminal alien hearing programs and caseload operations. To within 80 to 89 percent accuracy, completeness and timeliness, insures the Assistant Chief Immigration Judge is aware of concerns addressed by outside agencies, individuals and organizations.

FULLY SUCCESSFUL

To within 70 to 79 percent accuracy, completeness, and timeliness, assists the Assistant Chief Immigration Judge in the establishment and maintenance of contacts with outside agencies, individuals and organizations to effectively coordinate and review criminal alien hearing programs and caseload operations. To within 70 to 79 percent accuracy, completeness, and timeliness, insures that the Assistant Chief Immigration Judge is aware of concerns addressed by outside agencies, individuals, and organizations.

MINIMALLY SUCCESSFUL

To within 60 to 69 percent accuracy, completeness, and timeliness, assists the Assistant Chief Immigration Judge in the establishment of and maintenance of contacts with is aware of concerns addressed by outside agencies, individuals, and organizations to effectively coordinate and review criminal alien hearing programs and caseload operations. To within 60 to 69 percent accuracy, completeness, and timeliness, insures that the Assistant Chief Immigration Judge is aware of concerns addressed by outside agencies, individuals, and organizations.

UNACCEPTABLE	With less than 60 percent accuracy, completeness, and timeliness, assists the ACIJ in the establishment and maintenance or contacts with outside agencies, individuals, and organizations to effective coordinate and review criminal alien hearing programs and caseload operations. With less than 60 percent accuracy, completeness, and timeliness, insures that the Assistant Chief Immigration Judge is aware of concerns addressed outside agencies, individuals, and organizations.

EMPLOYEE NAME: Richard C. Soehngen Page 7 of 16

ORGANIZATION: Executive Office for Immigration Review
Rating Period: June 29, 1990 to March 1991

PART 1-PWP (continued

A. JOB ELEMENT NUMBER AND TITLE (CRITICAL /NONCRITICAL / WEIGHTING, IF APPROPRIATE):
Job element no. 3:

x Critical — Assists in development of systems to collect, verify and analyze caseload information and review collected data on a regular basis. Sets up ad maintains integrated reports, and major program.

❑ Noncritical — operations.

B. PERFORMANCE STANDARD(S):

OUTSTANDING — To within 90 to 100 percent accuracy, completeness, and timeliness, assists in the development of systems to collect, verify, and analyze caseload information and reviews collected data on a regular basis. To within 90 to 100 percent accuracy, completeness, and timeliness, assists in setting-up and maintenance of integrated reports and files.

EXCELLENT: — To within 80 to 89 percent accuracy, completeness and timeliness, assists in the development of systems to collect, verify, and analyze caseload information and reviews collected data on a regular basis. To within 80 to 89 percent accuracy, completeness and timeliness, assists in

	setting-up and maintenance of integrated reports and files.
FULLY SUCCESSFUL	To within 70 to 79 percent accuracy, completeness, and timeliness, assists in the development of systems to collect, verify, and analyze caseload information and reviews collected data on a regular basis. To within 70 to 79 percent accuracy, completeness, and timeliness, assists in setting-up and maintenance of integrated reports and files.
MINIMALLY SUCCESSFUL	To within 60 to 69 percent accuracy, completeness, and timeliness, assists in the development of systems to collect, verify, and analyze caseload information and reviews collected data on a regular basis. To within 60 to 69 percent accuracy, completeness, and timeliness, assists in the setting-up and maintenance of integrated reports and files.
UNACCEPTABLE	With less than 60 percent accuracy, completeness, and timeliness, assists in the development of systems to collect, verify, and analyze caseload information and never reviews collected data on a regular basis. With less than 60 percent accuracy, completeness, and timeliness assists in the setting-up and maintenance of integrated reports and files.

EMPLOYEE NAME: Richard C. Soehngen Page 9 of 16

ORGANIZATION: Executive Office for Immigration Review
Rating Period: June 29, 1990 to March 1991

PART 1-PWP (continued

A. JOB ELEMENT NUMBER AND TITLE (CRITICAL /NONCRITICAL / WEIGHTING, IF APPROPRIATE):
Job element no. 4:

x Critical

❑ Noncritical

Serves as liaison with management officers, immigration judges, interpreter clerks, and other EOIR personnel involved with implementation of provisions of the Criminal Alien Program to insure logical and coordinated policy directives, logistics and other activities.

B. PERFORMANCE STANDARD(S):

OUTSTANDING — To within 90 to 100 percent accuracy, completeness, and timeliness, maintains appropriate liaison level with management officers, immigration judges, interpreter clerks and other EOIR personnel involved with the implementation of provisions of the Criminal Alien Program. To within 90 to 100 percent accuracy, completeness, and timeliness, insures that logical and coordinated policy directives, logistics and other activities are achieved.ed reports and files.

EXCELLENT: — To within 80 to 89 percent accuracy, completeness and timeliness, maintains appropriate liaison level with management officers, immigration judges, interpreter

	clerks and other EOIR personnel involved with the implementation of provisions of the Criminal Alien Program. To within 80 to 89 percent accuracy, completeness and timeliness, insures that logical and coordinated policy directives, logistics and other activities are achieved.
FULLY SUCCESSFUL	To within 70 to 79 percent accuracy, completeness, and timeliness, maintains appropriate liaison level with management officers, immigration judges, interpreter clerks and other EOIR personnel involved with the implementation of provisions of the Criminal Alien Program. To within 70 to 79 percent accuracy, completeness, and timeliness, insures that logical and coordinated policy directives, logistics and other activities are achieved.
MINIMALLY SUCCESSFUL	To within 60 to 69 percent accuracy, completeness, and timeliness, maintains appropriate liaison level with management officers, immigration judges, interpreter clerks and other EOIR personnel involved with the implementation of provisions of the Criminal Alien Program. To within 60 to 69 percent accuracy, completeness, and timeliness, insures that logical and coordinated policy directives, logistics and other activities are achieved.
UNACCEPTABLE	With less than 60 percent accuracy, completeness, and timeliness, maintains appropriate liaison level with management

officers, immigration judges, interpreter clerks and other EOIR personnel involved with the implementation of provisions of the Criminal Alien Program. With less than 60 percent accuracy, completeness, and timeliness insures that logical and coordinated policy directives, logistics and other activities are achieved.

EMPLOYEE NAME: Richard C. Soehngen Page 12 of 16

ORGANIZATION: Executive Office for Immigration Review
Rating Period: June 29, 1990 to March 1991

PART 1-PWP (continued

A. JOB ELEMENT NUMBER AND TITLE (CRITICAL /NONCRITICAL / WEIGHTING, IF APPROPRIATE):

Job element no. 5: Assists in establishing a pro bono roster for state and federal hearing locations identified under the criminal alien program.

❑ Critical

x Noncritical

B. PERFORMANCE STANDARD(S):

OUTSTANDING To within 90 to 100 percent accuracy, completeness, and timeliness, maintains appropriate liaison level with management officers, immigration judges, interpreter clerks and other EOIR personnel involved with the implementation of provisions of the Criminal Alien Program. To within 90 to 100 percent accuracy, completeness, and timeliness, insures that logical and coordinated policy directives, logistics and other activities are achieved.ed reports and files.

EXCELLENT: To within 80 to 89 percent accuracy, completeness and timeliness, provides appropriate level of contact, assistance, and follow-up in developing and maintaining a pro bono program for criminal alien hearing sites.

FULLY

SUCCESSFUL	To within 70 to 79 percent accuracy, completeness, and timeliness, provides appropriate level of contact, assistance, and follow-up in developing and maintaining a pro bono program for criminal alien hearing sites.
MINIMALLY SUCCESSFUL	To within 60 to 69 percent accuracy, completeness, and timeliness, provides appropriate level of contact, assistance, and follow-up in developing and maintaining a pro bono program for criminal alien hearing sites.
UNACCEPTABLE	With less than 60 percent accuracy, completeness, and timeliness, provides appropriate level of contact, assistance, and follow-up in developing and maintaining a pro bono program for criminal alien hearing sites.

(5)

91-1264

No._____

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner,

v.

Merit System Protection Board,

Respondent.

APPENDICES

VOLUME V OF V VOLUMES

Richard C. Soehngen
Suite #100
8094 Rolling Road
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(703) 720-0315

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APPENDIX U

U.S. Department of Justice
Executive Office for Immigration Review

Chief Immigration Judge

5201 Leesburg Pike
Falls Church, Virginia 22041

April 25, 1989

TO WHOM IT MAY CONCERN:

It is my great pleasure to recommend RICHARD C. SOEHNGEN for admission to law school. I have had an opportunity to see Rick's work and intellectual fervor since he joined the Executive Office for Immigration Review in January, 1988. Rick had a distinguished record in the Army and in his prior academic efforts before joining the Office of the Chief Immigration Judge in El Paso, Texas, in the position of Management Officer as a Presidential Management Intern. From January, 1988, to July 1988, he served in that capacity and then transferred to the headquarters office as a program analyst in our newly established Criminal Alien Unit. **He has spent most of his time since July, 1988, assisting in the coordination and establishement of our hearing program for incarcerated aliens in corrections systems at the federal, state and local levels.** In particular, he has focused much of his effort on the establishement of pro bono publico programs to assure that aliens are represented in these hearings. His concern and willingness to take that extra effort to assure that incarcerated aliens have access to legal counsel in these deportation proceedings have been particularly noteworthy.

Rick has a particular creativity and initiative that could provide him with the types of skills necessary to succeed in a law

school environment. He is adept at indentifying critical issues as problems arise and in developing innovative solutions to these issues. He clearly enjoys thinking about solutions to problems and could, as a result, adapt to the critical analytical skills necessary to success in law school.

Rick's character is beyond reproach and the energy he brings to any task with which he is faced is formidable. His enthusiasm for intellectualizing issues that are presented to him should serve him well in a law schol environment. He is able to communicate his enthusiasm both orally and in-writing in an analytical framework.

I urge you to seriously consider Mr. Soehngen for admission to your program. His industrious nature will provide another opportunity for the legal community to benefit from his tremendous devotion to duty. If I can provide any further information, please do not hesitate to contact me at 703-756-6247.

Sincerely Yours,

William R. Robie
Chief Immigration Judge

(Exhibit, Grievance Process)

APPENDIX V.

Summation of Federal Employment History (And Mitigating Sensitive Circumstances)

Preface

As the court considers the constitutionality of the Petitioner's claim to his special compensatory, preference eligible combat-disabled veterans' rights raised in this petition for writ of certiorari, the following background series of facts may provide some additional perspective in deciding if Pro Se Petitioner is entitled to jurisdiction and the basic due process right to an evidentiary hearing in this case. Petitioner remains reasonably confident that even a cursory review of this background series of mitigating sensitive circumstances will show a clear pattern of prohibited retaliation, cover-up, and obstruction of justice emerge through over two years of litigation. Petitioner remains equally confident that this case could have been very easily and reasonably adjudicated at the agency level without burdening the Court were-it-not for the actions of certain high-level government officials attempting to cover-up their own deplorable actions, and Petitioner's subsequent lack of real alternative but to tenaciously pursue simple justice through the Department's own grievance process, the Merit Systems Protection Board (MSPB), and the U.S. Court of Appeals for the Federal Court.

The Court should note immediately that although I was successful in the grievance process, my employment had already been unlawfully terminated when the Fact-Finder's report was issued. As the Court reviews this background series of facts (most of which are already on the sworn record in this case through the Fact-Finder's grievance process), it will also become shockingly evident that there are no issues of poor or unsatisfactory performance, misconduct, inefficiency, or unsuitability of record in this unusual case despite ample opportunity for the government to have presented such issues justifying my unlawful termination before. Petitioner now respectfully asserts that it is these and other "subliminal issues" inherent in this case, which the jurisdictional barrier raised by the government is now attempting to use to seal the real issues from court scrutiny.

To avoid any adverse action which would automatically have entitled Petitioner to a hearing, the principal judicial officials involved chose to terminate Petitioner's employment based on an alleged mere "expiration of Presidential Management Intern appointment" that is not supported by the facts governing the nature of his tenure - particularly on a third year extension of a Presidential Management Internship, and special disabled veteran's status. This clever administrative and judicial tactic designed to thwart justice in this case has been upheld by the MSPB, and the U.S. Court of Appeals for the Federal Court. I now submit to this Court that the unpersuasive decisions and opinions that have thus far been rendered by both of these lower courts (which unconstitutionally ignored my veteran's preference and proof- positive claim, determined by the Department's own Fact-Finder, that the Department had violated the governing PMI and grievance regulations) were reached not on the facts and pertinent law involved, but on the special relationship of Petitioner's particular adversaries within the Federal Judiciary and the Federal Bar Association.

It is Petitioner's distasteful duty to now vigorously assert to this Court his firmly-held belief that it is the particular nature of these special relationships enjoyed by his principal adversaries within the judicial system (and Federal Bar Association), which has clearly impaired judicial impartiality, and thus far denied a reasonable measure of simple justice in this case.

In brief summary, Petitioner believes the infringement of his rights inherent in this case also affects veterans' rights in general, and special compensatory (30 percent or more) combat-disabled veterans in particular, and for other very substantial reasons warrant the Court's careful scrutiny. To be perfectly candid: Petitioner respectfully asserts the issues raised in this petition for writ of certiorari should not be decided in the "back corridors of power", through prohibited ex parte communication, or in a judge's chambers without all parties represented; as an alternate view, petitioner also respectfully submits that the series of facts presented now require (if necessary, by this Court's order), that the Solicitor General and/or the U.S. Department of Justice be requested to respond with a Brief-in-Opposition before the Court exercises its judicial discretion to review or dismiss this case.

The following series of facts (which will go largely undisputed in any evidentiary hearing that may be granted due to the substantial body of written documentation already on the sworn record) will show the unnecessary creation of a very hostile work environment, despite my repeated attempts to amicably find a reasonable solution within the confines of the Office of the Chief Immigration Judge. At the conclusion of these series of facts already largely in the sworn record, a "deep background" series of events is also provided for the Court's review. For reasons that should become obvious to the Court, I have prudently attempted to rely on the regulations specified in Chapter 362 of the Federal Personnel Manual (and related documents governing the Presidential Management Intern Program); U.S. Department of Justice Order 1771.1B governing the grievance process; my veteran's preference rights outlined in the U.S. Code; and the substantial body (over 550 pages) of written and sworn testimony in the grievance process. However, it is time this matter was put in its proper "politically correct" perspective before the only legal forum Petitioner is aware of, that could reasonably be expected to adjudicate and provide some form of equitable relief in this unusual case.

Statement of Facts

After approximately a year and a half as a patient at the Walter Reed Army Medical Center, during which time I underwent two operations, I was medically retired as a Captain with a 70 percent disability from the U.S. Army in January 1986 (which was later reduced to a 50 percent permanent disability when my medical condition stabilized). Due to my medical records from the Republic of Vietnam, my combat records, and subsequent medical history, my injuries were judged by an Army medical board to be "combat-related". Subsequently, the Veterans Administration also medically evaluated me and found the same percentage of disability (70 percent with no change in medical rating-to-date). At no time before or since have I had an adversary relationship with either agency regarding my well-documented medical conditions stemming from my two tours of duty in the Republic of Vietnam.

Shortly thereafter in January 1986 I enrolled in a masters degree program in political science offered through the University of South Florida at MacDill Air Force Base, Tampa, Florida. In addition to my medical retirement from the U.S. Army, the VA also agreed to pay full tuition, books, and associated fees under Chapter 35 of the VA's Vocational Rehabilitation Act.

Determined to continue to serve in some useful capacity in the government, I actively researched and sought in the fall of 1986 a university nomination to OPM's Presidential Management Intern Program which was the first step in OPM's nationwide selection process to recruit graduate students for a career in the federal government.

After securing two substantial recommendations from my professors, writing an essay the length of a small term paper, and completing other paperwork required by OPM, I formally applied for the PMI program in December 1986. As required by the OPM application for the PMI program, I also provided copies of my military orders for medical retirement specifying the percentage of disability at 70 percent and subsequent VA disability rating with the same percentage. At that same time, I also provided OPM with the security forms needed for the standard National Agency Check with Inquires (NACI) which is required before hire in the federal government service.

In January 1987 I was notified by OPM that I had not been accepted into the PMIP. Following OPM's own guidelines, I appealed this decision to the Director of the Presidential Management Intern Program on the basis of my veteran's preference.

In March 1987 I received the letter presented in the Petition for Writ of Certiorari which outlined the reasonable expectations I could have for a successful government career from OPM's Director of the PMIP who very graciously notified me that I had been selected as a 1987 Presidential Management Intern Finalist (the first in a student body of over 20,000 students at the University of South Florida to be selected). As a result of my appeal, two other veterans also became eligible because of their earned preference.

In April 1987 I also became the first USF student to graduate at MacDill Air Force Base, Tampa, Florida with a masters degree in political science with a specialized focus in national security affairs which is reflected on my official transcript. My GPA was 3.56 with almost 40 graduate credit hours earned at MacDill AFB, and includes transfer credit from George Washington University, and the U.S. Army's Command and General Staff College (from which I had graduated earlier in my military career).

In July 1987 while still in Florida, I accepted a position as a PMI/Program Analyst offered over the phone by a Department of Army agency located in Virginia.

In August 1987 I sold my Florida home and relocated my family of (then) five to Virginia in time to start my new position on August 24, 1987. My initial work with this agency involved helping to develop a 20 year strategic plan, based on the organization's long term goals and objectives, within projected budget constraints, in time for this agency's FY88 budget submission to Congress, due in November 1987. Within one week it quickly became apparent to me that most of this agency's projected programs would be slashed and that I would be searching for a more permanent program to help administer by the end of the year.

In October 1987 I had a successful initial interview for a position as a PMI/management officer in the Office of the Chief Immigration Judge (OCIJ), Falls Church, Virginia. This position would be in the El Paso, Texas Office of the Immigration Judge starting in January 1988. In November 1987, I had another successful interview before the Honorable Chief Immigration Judge (CIJ) William R. Robie and four other Assistant Chief Immigration Judges (ACIJ), including the Honorable ACIJ Mary Ann Mohan. As I had done for OPM, I provided copies of my U.S. Army medical retirement orders and VA medical rating during this interview. Subsequently in a letter dated December 1, 1987, I was officially offered the position of a PMI/management officer with the U.S. Department of Justice effective January 11, 1988. (Please note this date.) With CIJ Robie's letter I affected a smooth

transition from DA to DOJ and in-processed on January 11, 1988 with the U.S. Department of Justice without any difficulty.

After a few days' orientation with OCIJ and its parent organization, the Executive Office for Immigration Review (EOIR), I quickly rented my Springfield, Virginia house and moved my family to El Paso, Texas at my own expense. After expeditiously making arrangements for rental housing for my family, I reported to the Office of the Immigration Judge and assumed my new duties as management officer for the El Paso Immigration Court.

In February/March 1988 I researched the nomination requirements for the prestigious Presidential Management Intern (Program) Alumni Group (PMIAG) Award for outstanding government leaders who had a demonstrated history of promoting Presidential Management Interns in the PMI program with the Federal Government. With this information and CIJ Robie's biography, I successfully nominated CIJ Robie (working from El Paso, Texas) through a very competitive government-wide selection process to receive the 10th Annual PMIAG Award in Washington, D.C. Subsequently, CIJ Robie received a plaque from the PMI Alumni Group of former PMIs (still employed by the Federal Government) during a dinner in his honor in May 1988. This fact is cited in order to show the Court that the government would be hard-pressed to now depict me as ever having been disloyal to CIJ Robie or to any other member of the Department; or alternatively, as a social misfit undistinguished in the rudimentary professional and social skills necessary to cooperate as a team player in the federal bureaucracy.

In June 1988 I received a letter from CIJ Robie offering me a position as a program analyst in the Criminal Alien Program (CAP) Unit under ACIJ Mohan within OCIJ. Although the letter promised career progressions to GS-13 based on satisfactory performance, I suspected the primary reason for this offer was due to the former El Paso OIJ managements officer's inability to sell his house in the depressed real estate market in El Paso, Texas and his strong wish to return from the CAP Unit to his family in Texas. I was also aware of his close personal

friendship with ACIJ Mohan in Chicago preceding their government service and the fact that the position of management officer had in April 1988 been upgraded to a GS13/GM13 position (the same as the CAP program analyst position he was holding), thereby negating any incentive for him to remain in Washington. However, I was in no position to refuse this transfer which included my family's moving expenses, so without argument I accepted CIJ Robie's offer as graciously as I could under the circumstances. (CIJ Robie's June 10, 1988 letter is in an exhibit in the subsequent grievance filed with the Department.)

In August 1988 I moved my family of now six (our fourth child was born at the Ft. Bliss Army Hospital in April 1988) back to Virginia at some personal expense, and immediately assumed my new duties as a program analyst in the Criminal Alien Unit (consisting of ACIJ Mohan, a secretary, a court interpreter, and me.) Between August 1988 and November 1988 my family of six lived in a two bedroom apartment (at a personal cost of several thousand dollars) until I could evict my understandably angry tenants who felt that they had a 36 month lease in January 1988. This apartment cost the government approximately $1,900 a month.

On August 24, 1988 following normal career progression for Presidential Management Interns, I was promoted from GS-9 to GS-11 as a program analyst in the CAP unit (one year after I had entered government service and within two weeks of my arrival from Texas.)

In December 1988 my wife and I attended the annual semi-official Christmas Party held at CIJ Robie's home. (Please see the latter portion of this appendix for the significance of this particular fact.)

On January 13, 1989 I received a mid-year performance counseling session with ACIJ Mohan that went very well. During this counseling session ACIJ Mohan expressed satisfaction with my performance since August 1988 and specifically told me that I would receive at the end of the rating cycle in March 1989 either an "excellent or an outstanding performance rating" - she wasn't sure which. (A year and

a half later, during three days of sworn testimony and over 550 pages of transcript transcribed by a certified court reporter, ACIJ Mohan would not deny she told me this.)

January 1989 (Please see the deep background portion of this appendix.)

March 1989 (Please see the deep background portion of this appendix.)

On March 31, 1989 all performance ratings were due within the U.S. Department of Justice. Before the due date, ACIJ Mohan gave performance ratings to her secretary and court interpreter and established new performance work plans for these employees covering the new rating period from April 1, 1989 through March 31, 1990. However, I did not receive a performance rating or a new performance work plan as required by the Department's regulations and substantial policy guidance.

Throughout April 1989, without making it a major issue, I gently asked ACIJ Mohan for my performance rating on several occasions. She kept postponing any discussion of my performance and I began to become somewhat uneasy due to the circumstances outlined in the deep background portion of this brief. I also became uneasy when ACIJ Mohan stopped giving me any work to do.

On April 26, 1989 CIJ Robie gave me a letter of recommendation for law school attesting to my character and intellect, that I had originally requested in January 1989. (This letter was on exhibit in the subsequent grievance filed with the Department.)

On May 3, 1989, five weeks after it was due and one week after I had received CIJ Robie's law school recommendation, ACIJ Mohan gave me a mediocre "fully successful" performance rating. This had the immediate effect of blocking a transfer to the U.S. Marshal's Service for which I had begun negotiating after the third incident mentioned in the deep background portion of this brief occurred in March 1989. Although CIJ Robie and ACIJ Mohan would later submit affidavits attesting that a "fully successful" performance rating was a satisfactory

and honorable rating, the reality is that such a rating is a red flag form of subtle adverse discrimination that would effectively prohibit me as a Presidential Management Intern from transferring from OCIJ. It was also clear that this performance rating signed by ACIJ Mohan (as my immediate supervisor) and CIJ Robie (as my reviewer) did not square with the substantial recommendation I had received from CIJ Robie the week before.

Subsequently, ACIJ Mohan put-off two (2) appointments we had established to discuss my performance rating (at which point I would also have asked for a transfer) the following week. Due to the Department's clearly stated time restrictions for filing a grievance, and the annual immigration judges conference scheduled in Miami the following week, I had no alternative but to file an informal date-stamped grievance on May 12, 1989 with ACIJ Mohan, or lose my right to grieve this matter in its entirety later.

(The Court should note that this May 12, 1989 letter also contained what I still maintain was a very reasonable request for a Performance Rating for my period of honorable Federal Service in Texas the year before from approximately January 1988 to August 1988, which fact has been subsequently "lost" through the ensuing litigation process.)

Initially, I fully expected this matter would easily be resolved on an informal basis within OCIJ. As U.S. Department of Justice Order 1771.1B clearly established, it was my duty as the employee to resolve this matter at the lowest possible level. DOJ Order 1771.1B also requires all supervisors to resolve matters, if possible, at the lowest level before a formal grievance is filed. Within OCIJ and EOIR it was not unusual for CIJ Robie and the ACIJs to hold frequent phone conversations to address personnel matters such as were of concern to me (on the surface). On occasion, employees would also travel from one of OCIJ's 21 field OIJ offices to discuss matters directly with CIJ Robie and the ACIJ in charge of that field office. Although my office was later located within 20 feet of CIJ Robie's office, and right next door to ACIJ Mohan's office, the opportunity to discuss this matter

never occurred in my case (beyond any reasonable doubt, due to the deep background incidents related to in this brief).

When ACIJ Mohan and CIJ Robie returned from the annual Immigration Judges Conference a week later, I asked ACIJ Mohan specifically:

1. If I could discuss the matter with her. (Denied.)

2. If I could discuss the matter with CIJ Robie. (Denied and expressly prohibited from doing so.)

3. If I could receive a new performance work plan for the rating period April 1, 1989 through March 31, 1990. (Ignored.)

4. If ACIJ Mohan would assign a mentor to me as required by Chapter 362 of the Federal Personnel Manual governing the Presidential Management Intern Program. (Told no.)

5. If she had any work for me to do. (Ignored.) Of all the personal anguish associated with this case, the failure to give me any work was the most difficult for me to comprehend and accept.

On May 31, 1989 I received a memorandum from ACIJ Mohan (one of the exhibits in the grievance process) asking if I intended to file a formal grievance and giving me 24 hours to reply. I considered this terse memorandum to be deliberately intimidating, but was not deterred. (The memorandum is an exhibit in the grievance process.)

On June 1, 1989 I responded to ACIJ Mohan's memo with a date-stamped memorandum to CIJ Robie and ACIJ Mohan outlining my responsibilities to try to resolve the matter at the lowest possible level, my willingness to still do so, and my regret that I would have to file a formal grievance with Mr. Milholan, Director of EOIR, within the next day (to meet the grievance time restrictions) if they were still unwilling to discuss the matter with me. (This letter is an exhibit taken under sworn oath in the grievance process.)

In the absence of any attempt to subsequently discuss the issues involved, as DOJ Order 1771.1B required, I regretfully filed a date-stamped formal grievance through OCIJ to the Director, EOIR on June 2, 1989 (the last day to do so.)

On June 6, 1989 I reinjured my back while lifting me sleeping son, Victor, into his bunk bed. I immediately sought medical help from both a civilian doctor in a local medical clinic and military doctors at the military-operated Primus clinic in Burke, Virginia the next morning.

As required by EOIR/OCIJ sick leave policy guidance, I reported this injury by phone directly to ACIJ Mohan shortly after 9 AM on June 7, 1989. I told her that I had been medically evaluated by both civilian and military doctors and that I had received pain medication and a doctor's slip indicating I should remain bed- ridden. I therefore asked to use my accrued sick leave while I recuperated from this injury.

For the next five weeks, ACIJ Mohan's repeated response was to threaten me with being AWOL - despite the fact that I repeatedly sent her by certified mail the doctors' medical evaluations and copies of the medicine I was required to take. (Copies of which I still maintain and which also should still be on file in OCIJ.)

To this day, I still believe her outrageous response was both retaliatory (for filing the formal grievance) and an attempt to cover-up the incidents with CIJ Robie stated in the deep background portion of this brief. My response to this outrageous accusation of being AWOL (in view of my lengthy period of honorable military service dating back to 1967) was to request, also by certified mail, that this harassment cease immediately. On five occasions, I documented my phone calls with ACIJ Mohan and her repeated-needless-threats of AWOL and requested, also by certified mail, through OCIJ to the Director, EOIR "1 - 5 Requests for Relief from Reprisal Action" to no avail. (Copies of this correspondence should still be on file at OCIJ and EOIR.) These threats of being charged with AWOL only ceased after I had used up approximately 4 - 5 weeks of accrued personal and sick leave and had formally requested in late July 1989 Leave Without Pay (LWP) in lieu of Leave With Pay.

On June 21, 1989 I received a letter from CIJ Robie indicating my Presidential Management Intern/program analyst position was extended for a third year. Attached to this letter was a May 23, 1989 letter from Mr. Oser, Director of DOJ Personnel, requesting to OPM, without the required documentation required by Chapter 362 of the Federal Personnel Manual, that my internship be extended. (The letter also made no reference to the fact that a protected grievance had been pending at the time his request was made to OPM.) Also attached to CIJ Robie's letter was a letter dated May 26, 1989 signed by Ms. Paige, approving this request, also without the required documentation or indication a protected grievance was pending.

CIJ Robie's letter cited two reasons for this hasty, ill-conceived request: 1. that my background investigation was "not completed" and 2. he alleged my period of service as a program analyst was insufficient to warrant career conversion at that time. The Court should bear in mind that at that point my two-year internship was within two months of completion and at no time had either CIJ Robie, ACIJ Mohan, or anyone else in the Department ever discussed these requirements with me. (As the 3 days of sworn testimony during the grievance process would prove conclusively a year later, both of these reasons were pretextural and without merit.)

My immediate response was to draft a letter protesting the extension of my internship, which my wife hand-carried to OCIJ and EOIR also on June 21, 1989. Attached to my letter to Mr. Milholan, Director of EOIR was a copy of my military Top Secret clearance which had been first approved in March 1970 (while I was on my second tour of duty in the Republic of Vietnam) and last up-dated in November 1984. Besides my procedural objections to being notified in such an untimely manner (there was ample time to have discussed any extension with me from January through May 1989), I indicated that I had never been informed of these "requirements" for completion of the PMI program or for my service at DOJ.

Because the "facts" cited in this highly-irregular and hastily- prepared extension of my internship were very much in dispute, I requested

twice over the summer of 1989 that Mr. Milholan appoint a fact-finder as required (when the facts are in dispute) by DOJ Order 1771.1B governing the Department's grievance process. In what I still consider to be both a cover-up, and obstruction of justice, Mr. Milholan refused both these requests. Finally, while still timely with Mr. Milholan's latest rejection of my reasonable request to appoint a Fact-Finder as required by DOJ regulation, I consulted an attorney, Mr. William Bransford, who wrote a brief requesting a Fact-Finder be appointed in September 1989. Reluctantly, Mr. Milholan then requested the DOJ Personnel Office consider appointing a Fact-Finder.

In the meantime, since June 21, 1989 when I received CIJ Robie's letter extending my internship for a third year, I had been back-tracking through the DOJ and OPM security apparatus to attempt to learn the basis for why my "background investigation was not completed."

My years of experience as a former military officer had given me some knowledge of security clearance issues and I very much wanted to cooperate in any investigation that was deemed necessary.

What I learned became the proverbial "smoking gun" in this case. In a FAX sent on September 29, 1989 to my attention from the Federal Investigations Processing Center (FIPC) in Boyers, Pennsylvania the message is represented in its entirety following CIJ Robie's letter with attachments for the Court to now compare and consider:

APPENDIX W.

U.S. Department of Justice
Executive Office for Immigration Review
Chief Immigration Judge
5201 Leesburg Pike
Falls Church, Virginia 22041

June 16, 1989

Mr. Richard C. Soehngen
7920 St. Dennis Drive
Springfield, Virginia 22153

Dear Rick:

This letter will serve as notice to you that your Presidential Management Internship has been extended for a third year.

EOIR has determined that the period of time you have been assignedto the Criminal Alien Unit is insufficient to warrant career conversion in a program analyst position now. Additionally, your government background investigation, which was initiated in December 1987, has not been completed. Due to the extremely sensitive nature of managing the Criminal Alian Program, which as you know, requires constant interaction with prison officials and prison systems, the Department of Justice and EOIR have determined that it is impossible for you to be converted without successful completion of this essential security investigation.

Attached are copies of the DOJ letter to OPM dated May 23, 1989, and the OPM response dated May 26, 1989, on this matter. I fully intended to discuss this decision with you personally, but your extended absence from work has made that discussion impossible, and I did not want to delay this official notification to you.

When you return to work, I expect you and Judge Mohan to prepare and submit for my approval an Individual Development Plan (IDP)

and a Performance Work PLan (PWP) which will target specific areas for the coming year.

I also want to be very clear that this decision to extend you internship is in no way connected to your performance rating grievance dated June 1, 1989, which will be considered and adjudicated entirely separately pursuant to existing DOJ Orders.

Sincerely yours,
s(s)William R. Robie
Chief Immigration Judge

Enclosures

APPENDIX X

U.S. Department of Justice

Washington, D.C. 20530

May 23, 1989

Ms. Patricia Paige
Chief, Programs Division
Office of Personnel Management
1900 E. St., NW Room 6332
Washington, D.C. 20415

Dear M. Paige:

Richard C. Soehngen is a 1987 Presidential Management Intern assigned to the Office of Chief Immigration Judge (OCIJ), Executive Office for Immigration Review (EOIR) at the Department of Justice. Mr. Soehngen has served in a program analyst capacity assigned to the organization's Criminal Alien Unit since August, 1988. He served in a field capacity as a Management Officer for OCIJ/EOIR from January to July, 1988. Prior to his transfer to the Department of Justice, Mr. Soehngen was assigned to the Department of the Army for an initial internship period from late August through December, 1987.

At this time, EOIR has determined that the period of Mr. Soehngen's assignment to the Criminal Alien Unit is insufficient to warrant career conversion in a program analyst position. Additionally, Mr. Soehngen's background investigation, which was intiated in December, 1987, has not been completed. Due to the extremely sensitive nature of managing the Criminal Alien Program, which requires constant interaction with prison officials and prison systems, it is impossible to convert Mr. Soehngen absent successful completion of this essential investigation.

This letter is to request OPM's official approval of DOJ's extention of Mr. Soehngen's intership for a third year. Upon your approval, he will be advised on this decision and a copy of this letter will be provided to him. You may contact James L. Anadale, the DOJ PMI Coordinator on 633-3351 if further information is needed.

Sincerely,

Warren Oser
Director of Personnel

APPENDIX Y

U.S. Office of Personnel Management

Washington, D.C. 20415

May 26, 1989

Mr. Warren Oser
Director of Personnel
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Oser:

This is to inform you that your request to extend the Presidential Managment Internship of Mr. Richard Soehngen for a third year, into 1990, is approved.

Mr. Soehngen may be non-competitively converted to the career or career-conditional service at any point during the third year. As noted in FPM Chapter 362, Section 2-4(c), he may not be promoted above the GS-11 grade level during the extended internship period. **Also, the conditions for termination specified under FPM Chapter 362, Section 2-8, remain in effect during the 1 year extension.**

If you have any questions or concerns, please contact Beth Elliott on 632-0601.

Sincerely,
>s
Patricia Paige, Chief
Programs Division
Office of Affirmative
Recruiting and Employment

APPENDIX Z

United States Office of Personnel Management

Office of Federal Investigations
Federal Investigations Processing Center
Boyers, Pennsylvania 16018

Sep 29 '89

Mr. Richard Craig Soehngen
7920 St. Dennis Drive
Springfield, VA 22153

Dear Mr. Soehngen:

This is in response to our telephone conversation in which you requested I send you the status of your investigation from the date we received the case papers.

Our records indicated that on January 13, 1988, we were contacted by the Department of Justice, (OB & D) JMD and instructed to discontinue the Background investigation that was being conducted. On June 29, 1989 we were requested to reopen the discontinued background investigation. At this time the reopened investigation is still in progress. When the investigation has been completed we will respond to your Privacy Act request.

Sincerely,

(s) James C. Scott, Chief
File and Information Branch

The Court will not fail to immediately grasp the significance of this correspondence. Beyond any reasonable doubt it shows:

1. My BI was ordered discontinued by the Department two (2) days after I transferred to DOJ on January 11, 1988, undoubtedly because it wasn't required (my duties at DOJ, while confidential in nature, had not required me, as a non-attorney, to review any criminal alien litigation or otherwise handle any marked classified information, nor am I aware of any such classified information in OCIJ or EOIR); and that CIJ Robie's assertion in his June 16, 1989 letter to me (received June 21, 1989) that my PMI internship was being extended because my BI was "not completed" was a blatant misrepresentation and I submit, pretexual.

2. Perhaps even more significantly, it shows - beyond any reasonable doubt - that my BI was only reopened on June 29, 1991 after:

*I had filed a protected grievance on May 12, 1989 (six weeks before).

*OCIJ had requested the extension of my PMI internship for that primary reason on May 23, 1989 (five weeks before).

*I had respectfully protested the extension of my internship on that basis directly to OCIJ/EOIR with a copy of my Top Secret clearance (exhibit, grievance process) on June 21, 1989 (eight days before).

One year later, during three full days of testimony spread over three weeks, CIJ Robie and ACIJ Mohan would not dispute the integrity of this correspondence received from the FIPC in Boyers, PA.

In November 1989, my doctors permitted me to return to work. Upon my return I asked ACIJ Mohan for a new performance work plan (PWP) to cover the balance of the performance rating period through March 31, 1990. She asked me to write a new PWP based on my duties

and responsibilities as a program analyst in the CAP Unit. I asked her for guidance which she refused to offer. So I prepared a new PWP which established a series of quantitative performance standards by which ACIJ Mohan could both quantitatively and qualitatively evaluate my work with absolute discretion to rate me as my supervisor. Frankly, any objective comparison would show that this PWP was a far superior product than the almost perfunctory PWP I was offered in August 1988 when I joined the CAP Unit.

Attempting to cooperate fully with the PWP process, I asked her if there were any deletions or additions she wished me to make for this new PWP (that had been due April 1, 1989). ACIJ Mohan refused to offer any suggestions and guidance and, by neglecting to sign it for the balance of the rating period as required by regulation, refused to establish this (second possible) PWP. This meant I would continue through March 31, 1990 without a basis upon which I could objectively be evaluated as a PMI/program analyst in the CAP Unit.

The purpose of a performance work plan is clearly established in 5 U.S.C. § 4302. Performance-rating plans; establishment of:

> **"For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal service, each agency shall establish and use one or more performance-rating plans for evaluating the work performance of its employees."**

Nevertheless, ACIJ Mohan and CIJ Robie still refused to implement a PWP plan in my case.

Clearly the hostile work environment since April/May 1989 would continue during which time I would not have a PWP by which I could be rated for my performance, or given any work to do as a program analyst in the CAP unit. This is despite the fact that I would gently ask her for work, as I had done before on numerous occasions, during the balance of the rating period.

In mid-December, 1989, CIJ Robie again held his annual semi- official office party at his home with his live-in boyfriend. For obvious reasons, outlined in the deep background portion of this appendix, my wife and I chose not to attend this party (fact), as we had in December 1988 (fact), with reasonable expectations of having a good time. I am quite sure that I was probably characterized as being "anti-social" for not attending CIJ Robie's party by other members of the OCIJ staff who were ignorant of the circumstances, but there were very appropriate and valid reasons for choosing not to do so.

In January 1990 the U.S. Department of Justice announced that Mr. Roger Kaplan had been appointed as a Fact-Finder to hear my grievance regarding the extension of my PMI internship for a third year. At this time my attorney of record, Mr. Bransford, also informed me that Mr. Steve Murray would represent me during the grievance hearing.

Also in January 1990, ACIJ Mohan asked me for a list of training courses I wished to attend as required for a third year PMI extension (by regulation, this was required as part of an Individual Development Plan (IDP) before technically any extension of me PMI internship could have been "approved" in May 1989.) I asked for guidance regarding any courses she wished me to take, but she did not respond.

I started off with a request for two courses during the next training cycle which was the maximum offered to any staff member before. ACIJ Mohan kept asking me to increase the training request until I had over 10 training courses outlined for her review. In February 1990, with eight months left on the third year extension, CIJ Robie approved nine (9) training courses for me to attend and include in the IDP.

As required, I incorporated these training courses in the IDP (now 10 months overdue after the May 23, 1989 request was first submitted) and signed the finished product with a request for a counseling session so ACIJ Mohan and I could review the IDP together and I would know clearly the standards she wished me to follow. ACIJ Mohan refused to discuss the IDP with me and refused to provide me with a signed

copy. The Court should note that Chapter 362 requires this IDP as absolutely necessary for any third year PMI and ACIJ Mohan's refusal to finalize the IDP also left me without any objective means by which my performance could be evaluated.

From January through March (and on through August 24, 1990 when I was terminated) I continued to gently ask ACIJ Mohan if I could talk to CIJ Robie, which she vehemently refused to allow even though our offices were by then located within 20 feet of each other. Because of my military training and experience, I was very reluctant to break the "chain-of-command" in OCIJ, even though I realized by then that ACIJ Mohan was "running interference" for CIJ Robie, probably at his request, so I wouldn't be able to discuss any of the matters mentioned in the deep background portion of this case with him.

By March 31, 1990 ACIJ Mohan had fulfilled her supervisory responsibility to her other two employees by providing them with a performance rating covering the period April 1, 1989 through March 31, 1990 and a new PWP covering the next rating cycle from April 1, 1990 through March 31, 1991. But once again, she failed (for the third time since April 1, 1989) to provide me with a PWP so my performance could be adequately evaluated.

By April 1, 1990 I was determined that I would not let this malfeasance and sheer negligence on the part of ACIJ Mohan, as my supervisor, and CIJ Robie, as my reviewer, continue during the next rating cycle without a PWP in place by which I could be evaluated. When, as expected, I did not receive a new PWP for my position as a program analyst, I repeatedly, but gently, requested a PWP from ACIJ to no avail. Finally, once again, I was governed by the grievance time restrictions which forced me to file an informal grievance within OCIJ. For the next 30 days the request for a PWP was ignored. In mid-May 1990, I filed a formal grievance through OCIJ to the Director, EOIR. On June 6, 1990 I received a letter from the Director of EOIR indicating he had directed ACIJ Mohan to provide me with a PWP (as is customary for all government employees <u>without</u> exercising the grievance process.) On June 20, 1990 I received a PWP governing my

duties as a program analyst from June 20, 1990 - past me August 24, 1990 extension date - to March 31, 1991 this year.

By now, the Court should not be surprised to learn that this PWP was precisely the same PWP I had prepared at her request in November/December 1989 which she had earlier refused to sign.

On approximately May 2, 1990, the Fact-Finder requested from both parties a witness list for my grievance hearing scheduled for May 30 and 31, 1990. Since I had been working almost exclusively with Steve Murray from January through May, I requested in-effect that Mr. Murray subpoena Mr. Warren Oser, Director Of DOJ Personnel (who had requested my PMI extension on behalf of the Department) and Ms. Paige (the OPM representative who had approved my PMI extension request) to appear as witnesses. As I carefully explained to Mr. Murray and later to Mr. Bransford, there would be two issues presented (and approved by the Fact-Finder, Mr Kaplan and by Mr. Kohl, the Department of Justice attorney before the hearing commenced): 1. Did DOJ violate Chapter 362 of the PM regarding the extension of my internship? and, 2. Was the extension of my internship a prohibited reprisal for my filing a protected grievance? (Regarding the reprisal, I knew I had a heavy burden to prove this issue, but I was reasonably sure OCIJ had not informed the Director of Personnel that a protected grievance had been filed on May 12, 1989, before the request to extend my internship had been made on May 23, 1989. I also told Mr. Murray and specifically Mr. Bransford that it wouldn't matter what answer Mr. Oser would give; if he said "yes", he was aware that a protected grievance had been filed - this would be a prohibited adverse action under DOJ Order 1771.1B; and if he said "no", then CIJ Robie and ACIJ Mohan would have had a duty to have informed him of this fact.)

Mr. Murray agreed with my assessment, but was forced to defer to Mr. Bransford who refused to call either of the two witnesses. I considered this matter so serious that I requested by letter and by FAX, that he do so. He still refused this reasonable request, and the deadline passed for requesting these witnesses appear. To this day, I still believe, from a layman's perspective, that I had a fundamental and reasonable right

for these witnesses to appear, and that Mr. Bransford's repeated refusal to request these witnesses would be grounds for disbarment before the D.C. Bar Association.

In mid-May 1990, I had successfully negotiated for a transfer with a very agreeable prospective supervisor who was aware of the hostile work environment I was coping with. It was my hope that this peaceful transfer could also be affected on an agreeable basis for all parties, and possibly avoid the necessity of the grievance process. However, CIJ Robie refused to approve the transfer.

On May 30, May 31, and subsequently on June 16, 1990 the grievance was heard in law offices of Mr. Roger Kaplan, Suite 300, 1919 Pennsylvania Avenue, Washington, D.C. The record of proceedings comprises over 550 pages in three bound volumes with over 25 exhibits.

Besides proving beyond a reasonable doubt that my background investigation had been ordered discontinued by the Department two (2) days after I joined DOJ on January 11, 1988, and was only reopened eight (8) days after I had objected to the extension of my PMI internship on that basis, testimony also showed:

1. Neither CIJ Robie or ACIJ Mohan had ever discussed the need for a BI with me.

2. That neither CIJ Robie or ACIJ Mohan had inquired about the necessity of a BI when they sent me to prepare immigration deportation hearing locations in federal correctional institutions in Alabama, Arkansas, Kansas, Mississippi, and Oklahoma in the fall of 1988.

3. That neither CIJ Robie nor ACIJ Mohan could provide the type of clearance required for my position as a program analyst.

4. Perhaps most significantly, neither CIJ Robie nor ACIJ Mohan could provide a (non-retalitory) rational reason for my BI to be

reopened on June 29, 1989 after CIJ Robie had stated in his June 16, 1989 letter to me that my BI "was not completed."

Without the witnesses I had requested, I could not prove that a prohibited reprisal action had occurred. However the Fact-Finder would issue his 17 page report in October, 1990 finding that DOJ had violated Chapter 362 of the FPM by not providing the required documentation necessary for a PMI extension and utterly bebunking CIJ Robie's letter stating the necessity of a BI completion and any alleged training required as without merit. **He recommended that I be converted to GS - 11 career status effective August 24, 1989 (the year before).** For the record, there is not one (1) derogatory comment made by the Fact-Finder **directed at me** in the 17 page Fact-Finder's report that he issued.

As stated earlier, on June 20, 1990 I finally received my PWP signed by ACIJ Mohan and CIJ Robie and I looked forward to performing at the strict level of performance standards I had provided ACIJ Mohan in December 1989.

In July 1990 both parties submitted post-hearing briefs as required by the Fact-Finder.

In early August 1990, after several more gentle requests for work, I finally received an assignment from ACIJ Mohan (after approximately 15 months without work), to analyze the Earliest Possible Parole Dates (EPPDs) for the hundreds of criminal aliens in scores of correctional institutions located in New York State. Within a few days, I gave her an impeccable 28 page report showing the EPPDs necessary for scheduling future immigration deportation hearings on a timely basis. I expected positive feedback for this effort, but received no comment.

Frankly, by August 10, 1990 I thought I was on a somewhat better track (to transfer after I was converted to career status on August 24, 1990). The Court will note that I had about finished my required training with only one course yet to be completed on August 22, 1990;

I had a PWP in place covering the current rating period through March 31, 1991; and I had finally been given work to do as a program analyst, which I had completed in a superior and timely fashion. However, it was at about that point that both parties received copies of the three bound volumes of testimony from the grievance process.

On August 14, 1990, perhaps as a direct result of this reminder of the "protected grievance" process and the dismal testimony of both her and CIJ Robie, ACIJ Mohan presented me, without comment, a personnel action form showing that I would be terminated effective August 24, 1990 due to "expiration of PMI appointment."

Among some of the notable defects I noted in this document were:

1. It was signed by CIJ Robie as the approving authority, although the EOIR Administrative Manual clearly stated he had authority to terminate employees only at the GS 9 level and below. I was a GS 11, who under normal circumstances would have been under consideration for promotion to GS 13 with my PMI peers at that point in time, and as CIJ Robie's June 10, 1988 letter had held out the opportunity to me while I was still in Texas.

2. No reference was made to my special compensatory veteran's status which was required to be completed on the form.

It was clear from the onset since April/May 1989 that the carefully insulated personnel decisions made by CIJ Robie, a former Deputy Attorney General for Personnel, and by ACIJ Mohan, as a knowledgeable former PMI herself, had been designed initially to force me to consider resigning and alternatively to prevent me from transferring to another office or opening. This personnel action for mere "expiration of PMI appointment" was also designed to prohibit me from exercising my veteran's adverse actions rights clearly stated in Chapter 362 of the FPM, which would normally have been exercised by DOJ management if there was any documented issue regarding poor or unsatisfactory performance, misconduct, inefficiency, or unsuitability.

On August 24, 1990, continuing to remain professional in my deportment, I properly out-processed from the Department.

Also on August 24, 1990 my attorney filed a motion before the MSPB requesting that my termination be reviewed, in part, on the basis of my preference eligible status as a special compensatory combat- disabled veteran.

In September 1990, the Department requested that the MSPB deny jurisdiction to hear my case, (out of desperation, I submit, knowing that the Fact-Finder's report and the 550 pages of sworn testimony would be used during any hearing regarding my termination.) The Department also insisted that I was a "temporary employee" in spite of three years of federal service, and pointedly ignored my special compensatory preference eligible veteran's status.

In mid-October 1990, the Fact-Finders report, which had been withheld by the Department for at least 10 crucial days, was submitted by Mr. Murray as the Administrative Law Judge's initial decision literally crossed in the mail. As a former military intelligence officer taught never to believe in coincidence, to this day I don't believe that it was mere coincidence that it would cross in the mail after approximately 17 months of the grievance process, 5 months since the case was heard, and within the same day the ALJ would issue her initial decision, denying jurisdiction and ignoring my veteran's preference rights.

Within a week (late October 1990) after Mr. Murray provided me with a copy of the Fact-Finder's Report, and it "inadvertently crossed-in-the-mail" with the ALJ's initial decision, Mr. Murray was no longer employed by Mr. Bransford's law firm. This unexpected event was a shock to me, since I realized most of the "institutional memory" involved with my case would depart with Mr. Murray. I also believe that Mr. Bransford, who withheld the report for at least six critical days without informing me or Mr. Murray, did me a grave disservice by not immediately forwarding the report to the ALJ's attention. The Department staff had this information for at least two weeks and also failed, and I submit, deliberately withheld, this key evidence from the MSPB (which is co-located with EOIR/OCIJ in Falls Church, Virginia).

As expected, Mr. Murray's replacement, a Ms. Diane Veilleux (whom I have never met in person), was woefully ignorant of my case. In early November 1990, she sent me a very defective rough draft of the MSPB appeal of the ALJ's decision she planned to submit on my behalf. When I tried to explain over the phone several key points that were already on the record in the Fact-Finder's case, she told me it was "too late" to submit any additional evidence before the MSPB.

Frankly, Ms. Veilleux's caustic and cavalier attitude dismissing the evidence and recommendation of the Fact-Finder (i.e. that I should have been converted to career status effective August 24, 1989) troubled me since, 1. it was the original basis I had approached Mr. Bransford's law firm (at a cost of over $20,000 at that point) and 2. in my judgment, was now very germane to the issue of jurisdiction which the government had suddenly raised before the MSPB and I submit, was desperately seeking a way to avoid this previous testimony from being included in a full and impartial hearing.

As a result of her attitude regarding the evidence contained in the Fact-Finder's testimony, I felt it necessary to immediately send her (and Mr. Bransford) a cover letter with three (3) very detailed incident reports of homosexual misconduct involving CIJ Robie's live-in boyfriend (involving not "mere sexual harassment", but sexual battery since he had attempted to fondle me) at CIJ Robie's Christmas Party in mid-December 1988 and two brief, furtive incidents involving CIJ Robie, himself, in January and March 1989. The next day, I asked her to discuss the fact I had attempted to raise this matter with Mr. Bransford at our first three-hour meeting in September 1989.

In this September 1989 meeting, Mr. Bransford (without knowing all the facts) had correctly and vigorously asserted that their sexual preferences were their own business. Realizing I was losing credibility fast with him, (and embarrassed myself in raising these issues), I made a very conscious decision in his office to rely on DOJ Order 1771.1B governing the grievance process, and Chapter 362 of the Federal Personnel Manual governing the Presidential Management Intern Program. It is my understanding now with Mr. Charles Mansour, an attorney previously representing Mr. Bransford for the balance of his

fees, that Mr. Bransford acknowledges I sent him the letter with the incident reports and FAX in mid-November 1990, but disputes (in what I consider a form of "selective amnesia") the fact I had attempted to discuss these issues with him - before he cut me off sharply - at our first three-hour meeting in September 1989.

In November 1990, my appeal was forwarded to the full MSPB, and in a separate legal track, a letter was also sent to the AG's office asking, in effect, for the Department to uphold its own grievance process and to honor the Fact-Finder's Report and recommendations.

In late March, 1991, the AG's office sent me a letter overturning the Fact-Finder's Report on the basis of recommendations submitted by Mr Flickinger, Deputy Attorney General for Administration, (who allegedly had reviewed the case) to Mr. Barr and Attorney General Thornburgh. These recommendations, I submit, are in substantial variance to the record of proceedings in the Fact-Finder's case, and the specific recommendation to overturn the Fact-Finder's finding that it was DOJ who had violated Chapter 362 of the FPM by asserting it was OPM's responsibility directly reflected on the integrity of DOJ's own grievance process. I also was not given the opportunity to rebut Mr. Flickinger's recommendations in a full and open hearing.

The Court is respectfully asked to consider that a factual investigation and analysis made by an attorney on behalf of a district court (and, Petitioner reasonably asserts, to the Attorney General), does not suffice as an evidentiary hearing, because the purpose of an evidentiary hearing is to try issues of fact. *Pope v. Turner* (1970, CAIO Utah) 426 F2d 783, later (CAIO Utah) 461 F2d 644.

Five days later in early April 1991, I received the MSPB decision which continued to maintain I was a temporary employee who was not entitled to jurisdictional rights to a hearing, despite the nature of my PMI appointment and tenure, and which ignored my special compensatory preference eligible veteran's status.

In late September 1991, the United States Court of Appeals for the Federal Circuit also issued its decision and opinion which continued to maintain I was a temporary employee whose career conversion was the responsibility of OPM, not my parent organization, the U.S. Department of Justice. The Court's attention is directed to Section 2-7(2) of Chapter 362 of the FPM which clearly and unmistakably states: "The agency (based on satisfactory performance) decides whether or not to convert the employee. No recommendation is made to OPM."

(Please note that in August 1991 I had respectfully asked the United States Court of Appeals for the Federal Circuit to appear before its scheduled hearing of my case in September 1991 in order to answer any credibility resolutions the lower court might wish to make in this case. However the lower court denied me the opportunity to present oral arguement.)

Unfortunately, the lower court's decision and opinion is also notably defective in failing to acknowledge the key issue of my veteran's status.

DEEP BACKGROUND SUMMARY

The recent sex scandals involving notables have made me wince, but have also confirmed certain closely-held beliefs I have maintained to myself for a little over three years now. All I can say is that long before these other cases were the source of national amusement, I have been painfully aware of the major issues of timeliness and credibility I would face if I was forced to embarrass myself and my family (just to obtain a hearing in my case so I might retain my job).

It is perhaps the unfortunate nature of such inherent privacy cases that even if the matter is brought to the attention of the Court, such allegations can never be proved or disproved beyond a reasonable doubt. Thus, the "inconclusive" nature of such cases normally does not seem to offer any relief, particularly if one is trying to avoid a

mini-scandal with one's agency, and embarrassment to oneself and family.

But I respectfully request that the Court consider the totality of this (hostile) work environment in which I, without cause, was not given a performance work plan until I formerly grieved for a PWP so I could be objectively evaluated, and then only received a PWP just before I was terminated; in which I repeatedly, but gently asked for work and was not given an assignment until a few weeks prior to my termination; in which I repeatedly requested a reasonable discussion of any issues my supervisors' deemed important and was ignored; and the fact that I was denied the opportunity to transfer which might reasonably have avoided this disclosure, and permitted me to be fully productive in work that I really enjoyed.

In conclusion, this appendix has attempted to show my work history and the extenuating circumstantial evidence that might reasonably show the discriminatory intent behind my removal action.

I now respectfully submit that this removal action, which ignored my known special compensatory (30 percent or more), preference eligible combat-disabled veterans status, and the subsequent lower court decisions denying jurisdiction, may warrant the Court to review the due process protections afforded to preference eligible veterans under the Fifth Amendment of the United States Constitution. Thus, this writ of certiorari.

POSTSCRIPT

MEMORANDUM OF UNDERSTANDING

I, Charles Mansour, Esquire, do hereby confirm that I have spoken via telephone today to Mr. William Bransford, Attorney and that Mr. Bransford acknowledges that Richard C. Soehngen first discussed Judge Robie's homosexuality in general terms at their first meeting in September, 1989. Both Mr. Bransford and Diane Villieux, Attorney, also have acknowledged to me that they first received copies of Mr. Soehngen's letter and FAX of November, 1990, stating three incidences, in detail, of sexual misconduct by Judge Robie in December, 1988 and January and March, 1989.

Date:(Undated)

(Unsigned)
Charles Mansour, Esquire

(Please note: At his request in early October, 1991, Petitioner met in the law office of Mr. Charles Mansour, a Washington, D.C. attorney previously representing Mr. William Bransford, Petitioner's former attorney, for the balance of his fees. It is now Petitioner's understanding with Mr. Mansour, via subsequent telephone conversation, that Mr. Bransford acknowledges that I sent him the letter with the incident reports and FAX in mid-November 1990, but disputes, in what I consider a form "selective amnesia", the fact I had attempted to discuss these issues with him - before he cut me off sharply - at our first three-hour meeting in September, 1989.)